United States Court of Appeals

for the Second Circuit

APPENDIX

75-7600

United States Court of Appeals

For the Second Circuit

B

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FILED
MAY 19 1976
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SECOND CIRCUIT

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Columbia Broadcasting System

vs. 69 Civ. 5740

American Society of Composers, et al

New York, New York
December 5, 1973
10:00 A.M.

(Trial resumed.)

R O B E R T R. N A T H A N resumed.

DIRECT EXAMINATION (continued)

BY MR. BLUMSTEIN:

Q Mr. Nathan, let us talk for a few minutes about the per use proposal that CBS has made in this litigation.

You have read a document called elements of a e per use license, the document being dated May 1973 -- May 9, 1973?

A Yes, I have that document.

Q You have it in front of you now?

A Yes, sir.

THE COURT: It has an exhibit number, doesn't it

MR. TOPKIS: Yes. 881, your Honor.

THE COURT: Right. I don't want to be fussy. I just wanted to be certain we are all talking about the sam

thing.

Q What is your understanding as to the extent to which CBS expects to use a per use license to obtain performance rights for the Music Broadcast on its television network?

A It is my understanding that Columbia Television Network expects to use the per use license provided here only in limited degree; that this will be a, I think I used Dr. Fisher's words, a transition procedure to the use of direct licensing.

Q What is your understanding as to how music performance rights will be obtained if they are not obtained by the vehicle of the per use license?

A That they will be obtained by direct licensing of the copyright, between CBS and the copyright owner.

Q Do you have any views or any judgments as to how theme and background music would be licensed under the per use system?

A Yes, I do.

Q And could you give us your views and your judgments and the basis for them, please?

A For theme and background music, and I emphasize again, the arrangements for the production of theme and background music derive from direct contact between the producers

or the packagers and the creators of that theme and background music.

As it presently works, the packager or the producer locates, selects, employs one or more writers to write the theme and background music for the production. That writer or those writers are paid a salary or a fee for the creation and production of that theme and background music.

But, as far as performance rights, the writer derives that income through ASCAP or BMI, whichever licensing organization he is a member, in ASCAP, or an affiliate of BMI.

Further, the producer, if he has a publishing company, will also participate in performing rights, the receipts from performing rights through that publishing company.

Now, under a per use system, I have no doubt but that the network or its producers or packagers would seek to negotiate with the writers of theme and background music for the performance rights at the same time the arrangement is made with the creator of that theme and background music; that it would be a single, ongoing negotiati

Conceivably, the producer or the packager migh try to pay the writer a fixed amount, including performanc

rights and then whatever performance rights derived now under ASCAP would of course go to him, but on the direct licensing, where he would get the performing rights, there would be no payment then to the writer at all and the producer would save himself paying this variable amount to the writer.

But let us assume that that is not the arrangement but that the writer gets both a fee for writing the music as he does now and he also gets performing rights. This producer or packager would negotiate with that writer for the performing rights and the producer would arrange that payment.

I, from an economic point of view, cannot see any instance or it is difficult to conceive in the latest any instance where the per use license negotiated between Columbia Television Network and ASCAP, whether the rate is set in the negotiation or by the Court, would be used with respect to background and theme music.

I think that given the relationship between the packager and the producer on the one hand and the writer on the other that the producer or packager would succeed in negotiating for the performance rights.

We must realize that this negotiation is taking place before the music is even available and that that

negotiation inmmy judgment would encompass both the writing function and the benefits of performance so that in direct licensing, I would envisage for Columbia Television Network and the producers and packagers with whom it works success immediately in negotiating performance rights with the writers who produce the background and theme music.

Now, in your judgment, in such negotiations under a per use system, would the per use rate as it applied to theme and background music, have any influence or impact on those negotiations?

A Oh, I think the rate would be a very important element in those negotiations and --

Q In what sense, sir?

A Well, in the sense that the packager would seek the lowest possible rate.

If I may just make one other observation concerning this--my views on the background and theme music, I would start with one further conclusion and that is that in the negotiations between the network and the producer or the packagers, the network, Columbia Television Network would, on any logical economic grounds, seek to reduce the total cost of music below its present level.

If that word is subjective, I don't understand the whole procedure, the whole--case.

THE COURT: You don't think we would be here otherwise.

THE WITNESS: That's right, your Honor. I don't think we would be here.

I think Columbia Television Network is an intelligent, logical economic entity which would seek to reduce the cost of music.

Now, to the extent that that is accepted, to that extent, then we must follow through and try to figure what would the Columbia Television Network do in its negotiations with producers and packagers.

As of now, the television network includes in its

budget for producers of programs an item for the production or creation of background and theme music. That's part of the budget, to pay the writers for producing.

Performance rights are not part of that budget.

Now, under the per use system, the television network would seek from the producer or packager a product which would include performance rights because, after all, under this system, there would be no blanket license and the network would expect the producer to deliver a package which package would include the performance rights.

Now, it seems to me perfectly sound economics and logical that the Columbia Television Network would know what its been paying the producers and packers for writing component of music and then they would, say, well, now, we are paying ASCAP 4.3 million and we will figure out in our own minds some portion of that in relation to this program and we will give to the producer something less than that portion in order to try to save itself some money, in order to reduce the cost.

Now, the packager or the processor now has more dollars than he had before but he has more to deliver than he had before but the dollars he has for music is now less than the combination of what he paid the writers plus what Columbia Television has been paying under the performance

rights license to ASCAP or BMI and this, then, puts the packager into a new bargaining position vis-a-vis the writer and from an economic point of view, that bargaining position seems to me clearly favors the packager or the producer, who is in a sense operating very closely with the network and you have a strong negotiator on one side and something less than equal strength on the other side.

Now, this bargaining position and this reduced price is more than just an element of bargaining with that writer for a lower aggregate price or a lower aggregate income, let me say, from the two sources--namely, the writing and the performance rights.

As I see this negotiation, this becomes complicated by one other factor and that is that to the extent that producer has a publishing company and to the extent that producer is deriving, himself, an income from ASCAP, from his publishing company, the bargaining becomes more complicated.

For instance, why? This producer now will get a lower budget from the Columbia Television Network than he previously got adding on, of course, the performance rights.

Now, he immediately has a very significant conflic of interest here.

This lower amount that he has raises questions

with him as to his own royalty, performance rights royalties from the ASCAP.

Now, this man would obviously like not to have his income reduced so he is going to try, then, to put an extra squeeze on the writer because he is not only going to try to get some of that reduced budget exercised or operated or functioned through that writer by giving the writer less fixed or less variable but he now has an extra problem:

How am I going to preserve, he must say to himself--how am I going to preserve my level of receipts that I have been getting through ASCAP for my performance rights and if he were to try to reserve that out of a smaller aggregate music budget, then he must squeeze that writer unduly and it seems to me clearly, I am certain, that he is going to seek to get the lowest possible rate and payment to the writer and the per use license in my judgment doesn't really mean anything.

It will be a negotiated direct license and the bargaining position and the economic environment of the payment level will affect that bargaining arrangement or position such as to put the writers into an exceedingly difficult position.

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Q Mr. Nathan, part of the CBS proposal contemplates giving the ASCAP member certain rights of withdrawal.

You are acquainted with that part of the proposal?

A Yes, sir.

Q How would that right of withdrawal operate in a situation which you have just been discussing or would it operate at all?

A With respect to background and theme music, I can't see where the withdrawal right has any meaning.

The writer is negotiating for the performance rights of that music with his producer or packager prior to the production of the song, prior to the product.

Any direct negotiation with the producer or packager doesn't entail withdrawal. It is a direct licensing even prior to its getting into the ASCAP repertoire. It is a bargaining in which obviously the license--the per use rate is in mind as a ceiling, as I think it would operate clearly there.

As far as withdrawal is concerned, I don't say withdrawal as any meaningful action or opportunity for the writer under background and theme music.

Q All right. Let's shift to variety programs and the type of music that is used on those programs by way of

feature performances.

Would you please tell me how you envisage the per use system operating in connection with the licensing of performance rights for that kind of music?

A Well, for the licensing of the performance rights of that kind of music, it is my view that this will also result in the per use rate being a ceiling.

Now, we do have two distinct characteristics in the feature performance, variety type shows as we have for background and theme music.

In the first case, the feature music is in existence. This is already there, it is already within the repertoire.

Secondly, the producer or packager is not in sort of day-to-day direct contact with the owner, the copyright owner of this feature music.

By the way, there is a third difference.

With respect to feature music, the producer will not have a publishing company even if--he will not have a publishing company with respect to the music that is being used there. It might conceivably own that music, but certainly there's not that publisher participation as there is in the theme and background.

Now, given that we still come back, however, to

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the fact that the Columbia Television Network as an economic entity, performing as an economic man, corporate, will seek again to reduce the music cost, the cost of music in the package, and that will mean pressure on the producers or the packager to minimize the price which he will pay.

He will then seek both the quantity and the quality of music which will fit that budget, and with the reduced budget I believe that the per use license rate will be a ceiling and that the negotiations for direct licensing below that ceiling will prevail in the overwhelming majority of the instances.

Q What about the proposed right of withdrawal in those circumstances?

How would it work there and, in your judgment, would it be a means for a copyright proprietor to escape what you have described as the ceiling?

A As I would envisage from an economic point of view how this withdrawal might work, I believe that it would not result in copyright--in licenses, direct licenses, above the rate for per use as set by negotiations or by the Court.

I think that in the negotiations for direct licensing of feature music there will be a very strong tendency for the producer and packager to bargain low, and he will not subject himself or permit himself to be bargained aggressively or to be subjected to an aggressive bargaining

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or successful upward price bargaining by anybody who withdraws.

First of all, we must understand that the proposal by the Columbia Television Network provides for withdrawal, say quarterly, not instantaneously, and it provides for some things being excluded such as music in the can and commercials in the can.

But basically, according to the proposal of the limits of the per use license, Columbia Television Network does not permit or would not--would ask the Court not to permit instantaneous withdrawal on the part of the copyright owner.

Now, let's look at what that means. The copyright owner decides that he doesn't like the per use rate that has been set through negotiation or by the Court and he decides that he is going to withdraw in order to try to get a higher rate.

As of the time of his withdrawal it is obvious he is going to have little or not information as to how his works might be used in the next month, three months, six months.

So he is withdrawing with uncertainty as to what he has and what the demand for what he has would be.

Turned to the other side of the coin, as the

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Columbia Television Network outlines this approach, the suggestion is that some arrangements be made that upon withdrawal the Columbia Television Network know who is withdrawing and what music is available.

If no other means were provided, the very economic purpose of the publisher and the writer would be better served by their notifying Columbia Television Network, I'm not of ASCAP now and these songs are now available.

It is perfectly clear to me that this is a signal to the Columbia Television Network that this withdrawal is related to a design or purpose to get a higher than per use rate. Why withdraw?

I'm withdrawing because I think as a publisher or as a writer I think my music is worth more.

What kind of a signal is that to Columbia Television? It seems to me unless there is some tremendous overriding importance and uniqueness to that music, the signal to Columbia Television, stay away from this fellow. I'm not going to start negotiating with him, let me turn elsewhere. I can always get other music that's in the repertoire at the per use ceiling and I can negotiate for those who have stayed in for direct licensing of that specific music below the ceiling.

I think the withdrawal right is likely to become

a very serious disadvantage to having access to Columbia Television Network.

I'm not talking about Columbia Television engaging in an illegal activity,--

THE COURT: Just chose to buy what they would think would be the cheapest?

THE WITNESS: Yes, and the most economic, what they would think would be to their advantage.

Their advantage would be not to negotiate with those who would withdraw in order to get a higher price.

I do not agree that this is a self-correcting device with one exception, I think this whole process is a self-correcting device in a downward direction.

There is one direction in my judgment whereby this per use weapon over the head of the writers and over the head of the publishers work, and that is to drive down consistently the rates for direct licensing under this per use arrangement.

Q What is your view as to whether a copyright proprietor in these circumstances would be inclined or disinclined to withdraw any sum or all of his compositions?

A First of all, as I have indicated, the copywriter would be inclined to withdraw only if he thought he could get a higher performance rate payment.

Now, if the negotiation between ASCAP and Columbia Television Network ona per use rate were extremely low, and I find it hard to envisage that, or if the Court set a very, very low rate on a per use license, it is conceivable you could have a massive withdrawal.

You are saying, the writer saying, this isn't for ASCAP and we ought to just negotiate all of us. Otherwise, I think there will be some inclination for some to say: Well, if nobody else does, I am going to get out there and get that right away.

We must remember that you have the per use rate there and those who stay in can bargain for anything below that. See, it is not like direct licensing per say. Here you have a direct licensing along with a per use rate, and that is a completely different story.

I would think that the first few who might withdraw would I expect have such a bad experience, not in failing necessarily -- failing to succeed to get a higher

rate, but failing even to be able to negotiate. I think others would not withdraw. I find the withdrawal right in my judgment, as I see this work -- I believe that the withdrawal right is not a very meaningful right under this per use system.

THE COURT: Let us assume that in the main the only writer who would withdraw, perhaps universally the only writer who would withdraw, is the writer who thinks he will do better. That will lead one to conclude, would it not, that the persons most likely to withdraw, at least in the first instance, would be those whose music was most desirable and most sought of?

THE WITNESS: Yes.

THE COURT: The names that we know. If Irving Berlin withdrew, for example, do you believe that CTH would be able to persuade someone in that position to license his music for less than the per use price?

THE WITNESS: I don't believe he would. I don't believe they would no, your Honor.

THE COURT: What do you envisage happening in such a situation, a standoff?

THE WITNESS: I would envisage a standoff and I would envisage the person going back in to --

THE COURT: One or the other, somebody gives sooner or later?

THE WITNESS: Yes.

THE COURT: You don't envisage the possibility of CTN saying: Well, in this instance we will pay more?

THE WITNESS: If they do, then they are welcoming others to come out, so to speak, more pronounced. The more difficultyit has in negotiating for a higher per use rate, the more unlikely the others are to come out.

Most writers -- I guess they have great pride in this work -- I hope so -- but they are fairly realistic as to how they stand vis-a-vis Irving Berlin. As I see it. CTN would be foolish to negotiate quickly with Irving Berlin at a higher than ceiling price because it would mean others would come in; 99.9 rate on the rating, 99.8.

To the extent they resist and hold off, to that extent the others won't be coming. To that extent, they are assured of success at or below, I think mostly below the per use rate. It becomes a ceiling.

THE COURT: Thank you.

Q Mr. Nathan, let's talk about the per use rate, per use rate itself.

Do you have any views as to whether it would be likely or unlikely that the Columbia Television Network

and ASCAP would be able in the first instance to negotiate per use rates?

A I find it difficult to observe or understand how it would be arrived at, and I think it would be extremely unlikely that they could through negotiation arrive at some schedule of rates for per use purposes.

Q Could you tell us why, please?

A Well, let me try to explain my judgment as an economist with the forces at work, herein, the negotiation In any negotiation one side seeks to achieve its purpose and use its strength in an optimum way to achieve those purposes.

What do we have here? We have Columbia Television Network, strong, powerful, knowledgeable, able organizations seeking to change its systemwhich it regards I assume basically as improper, undesirable, cost too much, and it seeks to reduce its costs.

The logical conclusion, therefore, is to try to get the lowest possible per use rate, perhaps not so low as not to have some benefit of that. There is a ceiling. If it were way, way down near zero, everybody would withdraw from the system and come out and negotiate direct, but it certainly is going to be to the benefit of Columbia Television Network to keep that per use rate down.

The second side of the coin is ASCAP. ASCAP now has a blanket arrangement. Under that blanket arrangement, arrived at through negotiation, it is able to earn these aggregate revenues, but under a per use rate its members stand in a position of earning less if the Columbia Television Network is successful in getting a level of per use which permits it to pay less for performing rights than it now pays.

Also if ASCAP sees this, as I see it, and I know they would as a ceiling mechanism, then ASCAP must push for a fairly high per use rate. If you are going to have a ceiling, you have bargaining under a ceiling, let's get that ceiling up so there is room really to bargain. Don't have a low ceiling so you are bargaining with one hand tied behind your back.

So ASCAP must pursue a higher ceiling rate, a higher per use rate, let me say, rather than it seems to me that Columbia Television Network would be ready to agree to.

I find taking these diverse measures into view with the change in the system and with the uncertainties -- there are uncertainties -- I find it hard to envisage how the two parties here are going to be able to arrive at a level, and especially if I may add one other point.

I think Columbia Television reveals sensibly its concern about how this would work in its very second point when it talks about a per use rate and it uses such words as "as may seem appropriate." We have a schedule of rates.

If I may read this paragraph, "The fee for each use would be derived from a schedule reflecting the nature of the use. Feature, theme or background and such other factors as may seem appropriate."

It goes on to say, "The per use fee schedule can be as simple or as complex as seems desirable."

It goes on and says, "It could provide different prices for comparable uses of different works if that was thought equitable."

It is a complex matter and the complexity would add to this set of economic elements which I find as likely to preclude or make very, very difficult and remote a successful negotiation between ASCAP and CTN.

THE COURT: May I ask you this -- in all such bargaining, even the present bargainings between the networks and ASCAP or any other two bargainers but let's stick with them, the basic dynamics that you described exist, don't they? After all, the buyer is always trying to get the price down and the seller is always trying to get the price up.

THE WITNESS: Yes.

THE COURT: So, what you are saying in that regard is that the difficulties would be enormously aggravated by the proposed changes, am I correct?

THE WITNESS: They would be enormously aggravated by the proposed changes and not just because the complexity of per use rate, as to whether it is by 20 categories or 200 or 2000 categories of music or every piece separately, but it is also complicated and aggravated, your Honor, by the fact that just exactly how it is going to work is uncertain.

Now, I envisage, as an economist, this serving as a ceiling. Dr. Fisher thinks there would be flexibility up and down. I can't envisage it upward. I envisage it down.

And as each party figures in this new set of

relationships, which is different from anything we have had before, there will be a vast amount of uncertainty and each one is trying to protect himself from being exposed or exploited or getting caught in a set of cross currents that he can't quite fully see clearly at this time.

THE COURT: Right. Now, there is another point that we have to also bear in mind which is a feature of the present situation.

It is a fact agreed to apparently by everybody that in the 23 years since the present judgment has been in effect, althogh the Court has the power to set the fees if the parties can't agree, the parties have in effect always agreed and I think that there are some and I can't remember whether you are among those who are included in the view or who also share the view that one of the reasons why the parties always have agreed in the end is because they know that the fee is going to be fixed if they don't agree.

THE WITNESS: That is correct, sir.

THE COURT: Now, bearing in mind that that is also an element of the proposal of the new arrangement, to what extent do you think that, however artificial that scheme may be, it may bring about agreement?

THE WITNESS: Well, I think it is much less likely to be an agreement pressing force, an agreement generating force than the blanket license.

Here I come to the observation, your Honor, that the complexity of the issue with which you are talking makes it almost impossible to envisage the Court setting a fair rate, a set of rates for per use licensing.

Here we know now, ASCAP knows and CTN knows when they are negotiating, ASCAP knows and NBC knows when they are negotiating, and ASCAP and ABC, what they are negotiating and what the Court is likely to -- what the Court is going to set. Not the level but what it is going to set.

Now, in this particular instance, your Honor, the "what" of the rates under per use are not determined -- again, as I said, whether it is going to be every song separately which I just can't conceive of anybody doing, arriving at, or is it going to be a vast number of classes or a limited number and I think the Court will be in an almost impossible position because the purpose which Columbia Television Network has set forth as its goal in this change to direct licensing is a price competition purpose and price competition in the final analysis for unique items ought to be on an item by item basis, and

I can't see how that is going to happen.

In negotiations, even for the limited repertory of I think some twenty-some-odd hundred -- I forget the number -- I think 20,000 was the number that came to mind, but Columbia Television said in this elements paper that it expected to cover a portion of the repertory and it would leave out hundreds of thousands of works in which it had no conceivable interest.

Now it didn't say how many it would like to include in that, but it is going to be very sizeable, it seems obvious.

THE COURT: We know that NBC, when it asked for a nucleus license asked for something over 2000.

THE WITNESS: Yes, sir. But I would assume this would be sizeably larger and the very process of setting those rates, your Honor, I think is so disturbing to try to figure this out that I think, your Honor, knowing that the Court is there at the end helps in the negotiation.

I am not at all sure that that would have the same weight in dealing with this per use rate problem.

THE COURT: Mr. Hruska?

MR. HRUSKA: Yes, your Honor, in the light of Mr. Nathan's comments about Paragraph 2 of the proposal and perhaps to put this in context, I think it would be

helpful to bring out just quickly that the portions immediately following what Mr. Nathan read -- however, in light of the cancellation right discussed in Paragraph 6 infra, we believe that such a stratificatinn will not be necessary although it is completely compatible with a par use fee schedule. In all events, there is no reason to suppose that the fee schedule should be more complex than the formula used by ASCAP in making distributions to its members."

THE COURT: Do you want to comment on that?

THE WITNESS: Yes, I would like to comment, your Honor, on that, because I feel, Mr. Hruska, that there is every reason to suppose that the fee schedule for per use licenses would be more complex than the formula used by ASCAP in making distribution to its members.

We are here talking about two distinct purposes. The purpose of ASCAP in making distribution to its members is to achieve a degree of reasonableness in paying o to its members from this revenue derived from a blanket license under a reasonable formula, so that the members feel that they are being treated reasonably and we have a whole variety of payments but principally it is in relation to the amount of times their music is performed and if it is featured they get more and if it is theme they get less, and

the like.

Now, the purpose of that schedule is entirely different than the purpose of a competitive price or value negotiated between a buyer and a seller. This distribution mechanism within ASCAP for its members is not a price or value in the market place ex blanket license.

What this is is a stating by the members that "Our bargainer is selling our produce in the aggregate under a blanket license." It is being used by choice by the user and, then, our distribution of those proceeds is in relation to that use -- not item by item, but by categories and I say that a reasonable distribution mechanism for that purpose, which apparently has worked well and most ASCAP people are happy about it -- I am sure they have complaints, they have changes, subject to approval of the Court -- but as I see the purpose of that distribution system, I cannot conceive of that serving the same purpose in a per use license which involves literally dealing between the copyright owner and the user, not under a blanket license but piece by piece and product by product, and it is an entirely different objective, an entirely different schedule and I do not believe that the two are substitutable, one for the other.

MR. HRUSKA: Your Honor, I wonder -- I know this is unusual procedure and I do have an opportunity on cross-examination, but while we are on this point, I wonder if I just might point out that I believe that Mr. Nathan in his last answer is operating on a premise which is not the case.

The per use fee schedule is not intended to be a substitute for competitive prices. It is not intended to be a substitute for competitive market.

As we envisaged the system, the competition and the competitive market place will grow up around the direct licensing transactions.

THE COURT: I think Mr. Nathan understands that. Don't you?

THE WITNESS: Oh, yes. I do.

THE COURT: All that I got out of the last comment, and I don't mean to diminish it by saying "all," but I mean that the limits of what I think you intended to express were that to the extent there is a reference in the memorandum to the comparability of the present ASCAP distribution system or the adaptability of its factors, you simply don't see those as being the factors that will be used on the whole in reaching a per use schedule.

Is that correct?

A Yes.

In essence, that is correct, your Honor.

Q Mr. Nathan, I think you have already referred to some testimony by Dr. Fisher relating to what he thought was a self-correcting feature that would be built into a per use rate schedule either fixed by negotiations or fixed by the Court.

Do you remember that testimony?

A Yes, I do.

Q Do you agree with Dr. Fisher or do you disagree with him?

A I disagree.

Q Would you tell us why you disagree?

A Well, in essence, Dr. Fischer said that the fees set for per use license is not significant because the market will set that and either by negotiation or by judicial determination the fee then for the per use license can be changed in accordance with what happens in the market.

To the extent that the per use license serves as I believe it will serve and as I tried to explain, as a ceiling, there is only a one-way adjustment and that adjustment is downward and if, per chance, the Court took upon itself each three years or five years or two years, to adjust the per use license to what has taken place in the negotiations between the copyright owners on the one hand and the network or its packagers or producers on the other hand, we would have an eternal process of a lower ceiling and then lower negotiations, lower ceiling and lower negotiations, until that ceiling became so onerous that I think the licensing society would have to abandon its whole licensing function in this given area, say with Columbia Television Network.

THE COURT: Or its members would abandon it.

THE WITNESS: Or the members would abandon, one or the other.

It is silly for people to live under a constantly

suppressive and worsening situation and if Dr. Fischer is correct that the Courts or the negotiation will move toward the results achieved in the bargaining process, and if my conclusion is correct, and I believe it is, that it will be a one-way tendency of downward adjustment in this bargaining process, then I think it is a self-defeating measure.

THE COURT: I understand you to disagree with Dr. Fischer in regard to the ceiling concept.

Am I correct in understanding that you at least do not disagree and perhaps agree with him that over a period of time the per use price will probably follow what has been referred to here as the market price and that your disagreement with him is that it might go up?

THE WITNESS: Yes.

THE COURT: That's as I understand what you said.

THE WITNESS: Yes, I think it will tend to. It will tend to be adjusted to the market price as the negotiations take place or the Court makes its decision.

But I think it will be a one-way adjustment, not a two-way.

THE COURT: Right.

Q Mr. Nathan, could you, from your point of view as an economist, compare what the Court would be doing if it had to fix a per use rate under a per use licensing system

with what the Court might have to do presently if it were asked by the parties to fix, let us say, a rate for a blanket license.

A Well, we have just mentioned that the Court has never been asked really to fix a permanent rate on the blanket licenses, they have been internal.

But if the Court were asked--let us assume we did have a circumstance where the network and the ASCAP Society could not successfully conclude a negotiation.

I think given the experience that we have had and given the nature of problems--I don't think they are terribly complex for a blanket license--I think the Court could arrive at a reasonable blanket license fee that would be not really unrelated to what the parties through negotiation would come near to.

The fact that they can't come together is why it is put to the Court--

THE COURT: It would be something like an arbitrator's award.

THE WITNESS: That's correct, with a burden of proof on ASCAP to show the reasonableness of the fee it's seeking and the other side to show that or to say that it is unreasonable and the Court would set it and I don't see this as a terribly complex difficult, impossible problem.

But to ask the Courts today to set up a schedule of rates on a per use license is a completely different problem and that I find exceedingly difficult and as a matter of fact, if it is going to move towards simulating what would arrive in the market place, I think it is an impossible task for the Court.

THE COURT: I won't comment.

Q Mr. Nathan, let us move to the subject of trade offs.

Now, there has been some testimony in the record on that subject.

Do you recall it?

A Yes.

THE COURT: Trade offs?

MR. BLUMSTEIN: Trade offs, yes, your Honor.

Q Could you tell us what your understanding is of a trade off as it is being used to date in the record?

A As it's been used in the record, this concerns the matter of exercise of choices by the producer or the packagers in allocating his budget resources to different inputs such as writing of music--whether it is background and theme--such as scenery, such as costumes, such as the use of a star or lesser star; such as the number of people in the cast, the quantity of music and the like.

In other words, trade off here as I see it concerns the choices or alternatives of the packager or producer in how he will arrange his inputs and make his decisions as to what those components are in relation to the cost and, obviously, to what it will do to the show and the benefits in terms of the attractiveness of the product.

Q In your view, or do you have a view, as to the extent to which trade offs would be possible or likely, under a per use system with respect to programs which use either principally or exclusively theme and background music?

A The very essence of trade offs means you have something to, on which you make your choice.

As I see it and as I have explained and I'll just summarize very, very briefly, that the amount of funds that are likely to be made available by the Columbia Television Network to the producer or the packager for music, will be less than what Columbia is now paying for music through the assignment of part of the budget to the writer--to the producer for the writing of the music plus a part of what Columbia is paying to ASCAP for the music performance.

So that the combination of that which goes to the producer is less than what it has been in the past. That would be the very strong tendency.

Now, the producer has to continue to pay for the

writing of the music but now also the producer has to pay the performance rights and under those circumstances I cannot envisage the producer having any more for music to divert to scenery, to talent or to costumes or anything else.

I don't see any possibility of trade off in terms of taking from music for other purposes.

As far as the other side of the coin is concerned, it is entirely possible that he may now be put in a position where he has to squeeze out of talent, operating, the performing talent, out of scenery, out of costumes, out of the like, he has to squeeze to make up this deficiency in music.

Now, let me say clearly, I don't see a squeeze as a trade off. I think again it is a one-way street.

If the producer received enough money so that he truly could save in music and still have the same quality, performance and the like, well, then there is a possibility that he can take some of that music money for other purpose and now, of course, if he gets less money for the music, it is true he can have less songs but I would assume that now, given the blanket license, given the absolute choice--Dr. Fischer described, Dr. Fisher said that as of now the producer can use music or not use it.

In other words, he has the price in his head at that time. It doesn't cost him if he uses it, it doesn't cost

him if he doesn't use it.

But I would think that as soon as he begins to have to price it and he has a tight budget, it is possible that he may reduce the quality of his music or the quantity merely on price grounds and only in that way would he then have something left--that is, assuming he squeezes it way down below the reduction that he gets in his music budget, would he have something left to put into other purposes.

THE COURT: He will have more cash to play with, won't he?

THE WITNESS: Yes, sir.

THE COURT: So he has that specific choice at least until he finds out what happened.

Now, what you are saying is, however, that his net position is less favorable?

THE WITNESS: Sure.

THE COURT: Than his present position, or you contemplate that?

THE WITNESS: Yes, your Honor. It is just like if I buy a piece of goods and I buy it FOB and I have got to pay the transportation, I may think I am getting a bargain but if I buy the same goods CIF delivered and the transportation cost provides me with a savings, I am in a worse net position and, after all, that is how a person has to deal

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economically, as to where he is left.

THE COURT: Mr. Nathan, I don't know if there's anything in the record on it. If not, maybe it will come in sometime.

Perhaps you can supply the deficiency if the deficiency exists.

With regard to the proportion of budget which music represents or would represent for the kinds of show we are talking about--I would suppose, for example, that if music represented 70 per cent of the budget, which I am sure it doesn't, that you would do more trading off than if music represented one per cent of the budget?

THE WITNESS: That's correct.

THE COURT: Do you have any knowledge of that?

THE WITNESS: Not quantitatively. I read Mr. Dann's testimony where he did indicate that the music was of very small component of the total cost of variety shows.

THE COURT: You don't have any specific figures in the record, do we, gentlemen? I don't want to call a halt to the proceedings.

MR. TOPKIS: There's no direct testimony on the subject, your Honor.

THE COURT: Let's not get off the track then.

Mr. Blumstein, go ahead.

MR. BLUMSTEIN: Yes, your Honor.

Q Mr. Nathan, you were talking about the subject of trade offs as it related to theme and background music.

What about feature music on variety programs, are there any differences there that you see?

A I think the same factor arises here, theme and background music. Here perhaps even more pointed would be the quantity quality. Here the feature music would get in a sense some kind of a per unit concept and would be more expensive. As it gets its credit, this feature has a value and a price likely to be higher than a theme and background. Basically the same forces would be at work. The producer would get these funds which would be less than the total that the network is now putting into these budgets and, therefore, unless as his Honor indicated there were a substantial curtailment--a very big portion of the total and you had a little bit of margin in the use of music, that would give you a bigger leverage than the other parts.

I think the cases where music is a small component, generally--I don't know the numbers. I think similarly trade off possibilities as we understand them in these circumstances would be very slight in terms of feature music as well as theme and background.

Q Do you have a view as to what effect, if any, the per use system would have on the financial awards to writers

and publishers of music?

A Yes, I have. I think consistent with what I have said up to now, I believe the total amount of money that would be made available by the Columbia Television Network for music would tend to be less than would tend downward. To the extent that that is true, there would be less funds or less income available to writers. While writers I feel are primarily motivated by artistic and esthetic purpose, they do have an economic limit to take into account, their livelihoods, their families, their income needs.

To the extent that there are less funds available, overtime for music, to that extent I think you would have a reduction in the supply of music.

Q One last question about the per use system.

There's been some testimony or it's been suggested that the per use system or the Court direction of such a system would be some kind of a signal to the ASCAP membership which would have the effect of breaking down or lessening their disinclination to deal directly with the Columbia Television Network.

Do you remember that testimony?

A Yes, I do.

Q Do you agree with or disagree with it?

A I disagree with it.

Q Could you tell us why?

A Yes. I start out first--I indicated that disinclination is not a likely persistent and effective behavior in economic terms. I said before, just one word, if the Columbia Television Network made it very, very clear what it would do with respect to blanket licensing, I don't think that hesitance to deal with it would be significant and costly and very risky.

To the extent that the granting by this Court of the per use license would be a signal to the writers and publishers not to be hesitant, to come out because the Courts are going to watch every move and every step to assure that you don't hesitate. I don't see how that would work if there's hesitation or disinclination in the aggregate.

There are always legal steps. Let's look at it in an economic point of view.

In my judgment, the withdrawal right under the limits of the per use system with respect to theme and background music is meaningless. In my judgment, the withdrawal right if Columbia Television Network follows its economic instincts and interests in holding down the total income and payment for music works, that those who withdraw are going to be tremendously disadvantaged. Maybe an Irving

Berlin may break through that, but the economic tendencies will be for those who do withdraw to be disadvantaged and others won't follow.

From that point of view, if there is a disinclination, it is entirely conceivable that you go to a per use--maybe the thought is that this would be a signal to cease hesitation or cease disinclination.

I think it could work the other way.

THE COURT: In other words, you think at least after some experience with withdrawals which you believe will be adverse to the writer, that the remaining membership will be disinclined to withdraw?

A Yes.

THE COURT: They don't seem to be very inclined to withdraw at the present time. The new structure won't improve the situation in that regard?

THE WITNESS: That's correct, sir. Those who reach out and put their feet in the water, if it is fun and they stay, others will follow it.

If it is freezing, they get out. Others lack the experience, and I think the experience here as I envisage how it would work will make them more inclined to stay where they are rather than come out.

THE COURT: All right.

Q Let me turn to the alternative relief that CBS has requested in this action, which would be an injunction to prevent ASCAP from issuing a blanket license to all three television networks, CBS, NBC and ABC.

Can I ask you for your views as an economist as to the desirability of such an injunction?

A As an economist I find this totally contrary to the objectives that have been set forth here and from an economic point of view of permitting the maximum degree of choice.

Here we have three networks that are the powers and dominate television broadcasting, programming, this very important vehicle on the American scene. Seemingly two of those networks are willing and have manifested a willingness or interest in going along with the blanket licensing. They find it useful, convenient, efficient, acceptable, and you have one, Columbia Television, which now wants to break the blanket licensing.

The very essence of new frontiers is to go ahead and be venturesome in them. It seems to me what Columbia Television is saying here, if we go ahead withthe direct licensing, we will be disadvantaged for some reason, the others will have the benefit. The main reason I gather they give us disinclination as I read the case. I don't

believe that that has that role, that disinclination is that important. I believe for Columbia Television Network to say that in order for us to try that,we want to avoid risk in getting the music and, therefore, let us not have risk, let us eliminate the risk and by forcing the other networks to do that which they now are doing and that which they want to do and that which apparently is their purpose, free choice, it seems to me is the total antithesis of the conception of Columbia Television is pursuing, namely, freedom of choic and freedome of determination.

Q Mr. Nathan, would you give us your definition as an economist of a monopoly?

A Monopoly has been defined quite variably, but basically monopoly is an economic entity that can independently, unilaterally determine what it produces, the price at which it sells and the profits which it will receive taking into account the non-competition of others, but the market conditions that prevail and the source of supply. It is an economic entity which is not subjected to direct competition in its products and the price of those products.

Q In your judgment, Mr. Nathan, does ASCAP have the power to determine unilaterally the price at which it will sell its repertory?

A No, it certainly does not. It has to bargain

that price in its relations with the television networks or with the industry committees in local television or the industry in radio or with its other users.

Again, I emphasize that to the extent that agreed upon price is not reached, it can always be referred to the Court.

THE COURT: Is your view that ASCAP does not have the right to determine price unilaterally restricted to the provisions of the decree or are you saying that even if the decree were not in effect --

THE WITNESS: No, I am accepting the decree, your Honor, as being in existence. I don't know how it would behave without the decree. I am taking the decree as a condition of its operation, and given that in terms of the price, your Honor, ASCAP is not a monopoly.

THE COURT: All right.

MR. BLUMSTEIN: I might say, your Honor, at this point I would have had Mr. Nathan explain some of the charts that he prepared, specifically on this issue. We will save that until next week when he comes back.

THE COURT: He is going to testify directly on that material next week and be cross-examined on it next week, is that right?

MR. BLUMSTEIN: That is my understanding.

THE COURT: Either way is all right with me. Would this be a good time for a morning recess?

MR. BLUMSTEIN: Yes, your Honor.

(Recess.)

BY MR. BLUMSTEIN:

Q Mr. Nathan, one more question on the Court being available to fix the fees if the parties are unable to agree on those fees by negotiation under the present system. Do you see anything which suggests to you that the Court would not be able to function effectively in fixing those fees within the strictures of the kinds of proceedings that would be brought before it?

A No, I do not. It would be an adversary proceeding with the contention of the two parties in favor of their proposed rights. In these circumstances there would be a wide array of legal, economic business, professional talents available, both sides, which would be of help to the Court in coming to the conclusion under the present -- of a rate under the present decree.

Q In your judgment, does ASCAP have the power to exclude the competitors competing licensing organizations?

A No, it clearly does not. BMI came into existence long after ASCAP had been in operation. There is the Society of European Composers.

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Q You are referring to SESAC?

A SESAC, yes. I don't see how ASCAP could serve to preclude any other organizations serving this function.

Q Do you see any particular obstacles to a new organization entering the field today, tomorrow, next year, whatever?

A No, except the normal business problems of capital, time to get going, the investment in developing contacts and time in building up experience. If it is a commercial organization it would not be profitable the first day or the first year, but the amount of investment wouldn't be nothing like what is involved in many, many industries today.

I see no basic reason why there couldn't be a new organization to deal in this area.

Q It has been suggested here that the four fund system of distribution of ASCAP writers might be a deterrent, might be an obstacle to the creation of a new performing rights organization.

Do you agree or disagree with that point of view or testimony?

A I disagree with that point of view.

Q Could you tell us why, please?

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A Just briefly, the four fund system is one of the methods whereby members of ASCAP derive their income under the distribution arrangement.

That four fund system is a variation from the other alternative which the members of, namely, of receiving their income on a -- on current performance basis. Now, the four fund introduces an element of redistribution among members. They take into account qualified performances, take into account the duration with which members have been associated and affiliated with the Association.

In essence, what happens is that the writers who have been there longer and who had more qualified works of some added benefit relative to those who are the newer writers and the newer works, with the newer works.

As I think Mr. Marks stated, certainly the newer writers who are on the uptrend in productions and performances are favored currently through confining their choice to current performances whereas those who are on a plateau, in the declining level, benefit with the four fund system.

We must ask ourselves, try to understand why this happens, why a person would select a four fund system rather than current performance system. It seems to me clear that this redistribution must have some advantage or

some hope for advantage.

I think that those who are on the upgrade anticipate staying with the thing and some day that there will be a redistribution in their favor. It is not a matter of saving something that they would have a right to today and receiving that later. It is being on the other side of a redistribution process.

Now, if a new licensing organization were to come into being, I would think in many ways that new organization would have strong advantages in that, if it offered only current performance rights, it would have some advantages in terms of the current crop of new writers on the upgrade.

Now, some of them do operate for the four funds, but not immediately, most of them. I don't know the proportion. As I read Paul Marks' testimony, a lot of them joined the four fund later. It would seem to me that a new licensing organization would be primarily interested in attracting away from ASCAP the newer writers, the more successful writers, the ones whose income under current performances would be the largest. There they would be most likely to be successful. To the degree that they are successful in attracting away the new writers on the rise, to that extent the four fund system becomes less advantageous to the older writers.

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As I see it, I don't think that the four fund system would be a deterrent in terms of new organizatioon coming into being and being able to attract new writers.

MR. BLUMSTEIN: I have no further questions of this witness.

THE COURT: Are you ready?

MR. HRUSKA: I am, yes, your Honor. May I inquire through your Honor whether BMI has any questions.

THE COURT: Excuse me.

Miss Kearse?

MISS KEARSE: We have no questions, your Honor.

xx CROSS EXAMINATION

BY MR. HRUSKA:

Q Mr. Nathan, I would like to start with, first, principals, if we may.

Do you agree, sir, that in our society we generally function under competitive marketplace bargaining arrangements whereby most entities in our economy bargain for that which goes into the creation of goods and services and also bargain the price for which those goods and services are sold?

A Yes, I agree with that principal and I think that the majority of our transactions are so characterized.

Q And do you agree that that is the economic system under which this society has prospered and grown?

A Yes, recognizing the exceptions that are extensive but that has been a very important factor in the strength and growth of our system.

Q And do you agree that the competitive marketplace

is the mechanism where values tend to be determined over time in the most appropriate manner?

A For most transactions, yes.

THE COURT: Are they quotations from Dr. Fischer or Mr. Nathan or the Supreme Court or what?

MR. HRUSKA: You don't think, your Honor, I could have made them up.

MR. BLUMSTEIN: We know better.

MR. HRUSKA: These are quotations from Mr. Nathan your Honor.

THE COURT: Thank goodness he gave the right answers.

Q In short, Mr. Nathan, you like free competition, don't you?

A Very much.

Q Do you believe that music publishing ought to be open to the free market much as book publishing, much as other creative undertakings in our society?

A To the degree that it is feasible and practicable, yes.

Q And in the free market, you let prices be set by what happens from demand and supply factors, innovation and technological changes, product adaptation and other influences which manifest themselves in the competitive

sphere?

A That's correct. These are the factors that determine the free market price.

Q And you are an economist who favors marketplace price determinations over Governmental pricing?

A With exceptions, yes, I do, except for public utilities and things of that nature, butin the majority of transactions, I certainly agree.

Q And as an economist, you would much rather see legal price fixing erased altogether except for the public utilities sector?

A Except for the public utilities sector generally, that is correct.

Q You testified yesterday that ASCAP and BMI were not public utilities and I would like to explore that for just a moment.

Would you say that the most significant factor in removing businesses which do qualify as public utilities from the free and open competitive market, factors, are conditions with free entry and open competition would result in clearly uneconomic duplication of facilities?

A Generally, that is true.

Q And if those cases, therefore, monopolies are created through franchises or licenses and they have legal

status as monopolies?

A That's correct, sure.

Q And, therefore, Governmental bodies must set the prices for those public utilities?

A Yes, sir.

Q Putting ASCAP and BMI to one side, is there anything in the music publishing industry which gives it the characteristics or elements of a public utility in our society?

A Offhand I can't think of any.

Q There is no reason for concern in music publishing over uneconomic duplications of rights of way or costly capital facilities?

A Oh, none of the elements of large waste by duplication of facilities apply at all in music publishing as I see it.

Q And neither the removal of music publishing from a competitive marketplace nor Governmental price regulations is justified by the exclusivity of the copyrights owned by the publishers, is it?

A No.

Q You agree with the last statement?

A I agree. I mean to say none of this is, and I suggest none.

Q Do you also agree, sir, that it makes just as little sense to remove music publishing from a price competitive marketplace as it would for, say, book publishing?

A Well, if you are referring to performance rights, then I must disagree because there you have a very different market mechanism and a very different distribution system and a very different use factor then occurs in book publishing.

In other words, when a book is published, the production of that printed product is in essence a final product to be enjoyed by the user. The production of music on a record, as our system has evolved, is not a final product to be enjoyed by the user because it goes then through intermediate channels where performance become an important factor.

So there is a difference in the economic structure of book publishing and music use.

Q Well, I am afraid I don't understand that but let me put it to you in these terms.

Do you agree that it makes just as little sense to remove music performance rights from a price competitive marketplace as it would to remove music mechanical rights?

A Music mechanical rights. Reproduction rights?

Q Yes, sir. You know what they are, don't you?

A Yes. Oh, yes, I've been involved in hearings--I am afraid the answer is no.

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Again I come back--

THE COURT: That is, you disagree with the question?

A I disagree

I think these two are not the same. I think that what we have, and again if I can draw a distinction, is the music publishers are highly competitive. The record companies are numerous and they are highly competitive.

The payment by the record companies for the right to mechanical reproduction is a highly competitive system and I think that the ceiling rate there has no validity.

But, this is a very clear competitive simplified market relationship.

But I come back to saying that in the music performance, one has a very complex market relationship whereby the absence of any intermediate vehicles for the handling of these performance rights, the setting of them, the paying of them, the monitoring of them, the policing of them, the distribution of the prose from them, are quite distinctive from what happens in mechanical reproduction of music.

Q I would like you to consider two cases.

In case number 1, the manufacturer of a phonograph record, let's call him X, approaches the publisher of a song that the manufacturer wants to use.

They negotiate a price and they arrive at, let's say, the price of one [redacted] three quarter cents per son per record sold.

A Yes, sir.

Q Case number two, the producer of a television program approaches the same publisher and he wants to use the same song and he wants to use it on a program and that program may be repeated, that program may go into syndication, a lot of things may happen to that program.

A Yes, sir.

Q And they negotiate a price and let's say that the price they negotiate is $800 for the use of--for the first use of that song and decending prices for subsequent uses.

Now, will you tell me, sir, what the differences are, the distinctions, between those two cases which makes a Governmental price fixing for mechanical rights, taking mechanical rights out of a free competitive market, bad from an economic standpoint but taking performance rights out of a free competitive market good from an economic standpoint?

A Well, in the first place, I am sorry that the example you gave me now is not what I understood you were giving before.

With respect to television network making such

arrangements, I think that is perfectly logical and they are completely compatible and I seeno reason for a ceiling on mechanical reproduction of music nor do I see any reason why the Government should intervene in the negotiation between the television network and a copyright owner for the use of that music.

Q In either case?

A Either case, that's correct.

Q In mechanicals or performance rights?

A That's correct.

Q Do you agree, then, that the idea that a Governmental regulatory body should set rates for mechanical rights or music performance rights makes no sense whatever and is indeed ludicrous?

A Well, I am sorry, but you are now taking me from the principle which you enunciated before of the television network, where I agreed--if you would use the word television network, I would agree with your conclusion, but if we are going to apply it across the board to all music performance rights, then I would disagree.

Q You agree with the proposition I stated in my last question insofar as it applies to music performance rights being licensed to television networks?

A That's correct, sir.

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Q I would like to read you a statement and sharpen this up and see if you agree with the statement.

The statement is:

As an alternative to carrying out the public utility regulatory function itself, the Congress would need to establish some kind of regulatory commission to which it would assign authority to conduct hearings and set royalty rates for the mechanical reproduction of music.

The commission would need to function in such a manner as to take into account all of the varied activities of music publishers and of record producers so as to develop the rationale needed for fixing and adjusting royalty rates and the data for precise rate determinations.

The more spelling out of these functions with respect to the mechanical reproduction of music reveals the ludicrous nature of the public utility contention.

Also, if statutory rates are to be set for mechanical reproduction of music, then why not for performance royalties. Price fixing in this industry clearly makes no sense.

A I said that, I stand by it and I think it is a good, sound, economic statement. I think that whole ceiling arrangement on the mechanical reproduction makes no sense and the record companies kept insisting it wasn't a ceiling,

it was a royalty rate and I said, if it is a royalty rate, then to have a fixed price of a royalty rate, a mechanical reproduction on our books for 60 years, flat, never changing, with inflation and productivity, just made no sense, it was ludicrous.

Q And price setting for either mechanicals, mechanical rates or for performance rights rates, vis-a-vis television networks, makes no sense whether it is done by an agenc by a court, by a statute or by private combination.

A Oh, these are quite different. Private combinations can arrive at price through negotiation, not price setting. It depends on how one defines--

Q Talking about price setting, sir.

A We have rate setting by unions who are groups and negotiate with companies.

I don't think that is price setting. I think that is price determination and a negotiated result.

This is where I would like to draw the distinction. I think that, as I said, the price set under blanket license for music performance is a negotiated, not a fixed price. It is not a Government set price. It is neither a flat rate like the two cents on the mechanical production nor is it the telephone rate in North Carolina where I testified last week, at Raleigh, North Carolina, on the whole problem of

the rates for the Bell System of North Carolina.

That is a Government fixed rate, based on adversary proceedings but that was--there is no negotiation there between the Bell System of North Carolina and the user and arbitrary, you know, compulsory arbitration, if they couldn't arrive at it.

I think these are completely different price fixing mechanisms.

I believe, or I agree with you that the--either the legislative setting of rates in the performance rights for music or setting by a regulatory body would be wrong.

Q Well, now, in the present world, if ASCAP and a user of music cannot agree on a blanket license fee, that fee is set by a regulatory body in a sense, a court of law.

You understand that?

A Oh, yes, I understand that and that--and as I said, that would be an adversary proceeding, where the two parties would come and present their facts and the burden of proof would be on ASCAP to indicate the reasonableness of its level, but I think that is very different from a public utility commission determination.

Q How?

A Well, the public utility commission determination has certain principles. Here there are not any. This is

a bargaining matter.

What do you want and what do you need and why do you need it and all this, and the other side, here is what I can afford to pay.

I've never said, and I've been in dozens of public utility settings, where what the person can afford to pay and what the local electric company or the Government can pay, this has nothing to do with it.

What they said is under public utility regulations, we have principles and the whole case is that the public utility has a right to a reasonable rate of return, the consumer has a right to be protected from exploitation, it has to be fair among the producers, it has to be a rate of return which assures access of the public utility to the capital market and all of these factors are quite different, however, from when you have a sort of a compulsory arbitration not a set of principles to adhere to.

Q Do I understand your correctly, then, to say that you think that price fixing by a regulatory body in a public utility context makes more sense, is better from an economic standpoint, than price fixing by the Federal Court for an ASCAP blanket fee because there are principles to be applied in the former case and none in the latter?

A Oh, by no means. I don't agree with that. We

are talking about two different purposes. Here we are talking in a public utility of prices set in a monopolistic condition, set to be fair to both parties and by very different standards and that doesn't mean that is better at all.

That is a different purpose. It is for a monopoly, where there is no mechanism, really, to determine bargaining between the parties.

Here we have a different matter. Here we have CTN and ASCAP sitting down to bargain on a blanket license and Mr. Finkelstein says I want $6,000,000 a year and Mr. Sipes says, 6,000,000? This is crazy, I am not even going to talk to you, goodbye, and, you know--

But let's assume they do bargain and they sit and Mr. Sipes said 3,000,000, 6,000,000, so they come down a little, go up a little, they just can't agree.

So they go to the judge and present all the facts and the arguments.

I think this is a perfectly proper proceeding in our society to have compulsory arbitration.

Q When you go before the judge and the judge sets the price, do you end up with a competitive equilibrium price?

A It depends. I would say in the blanket license you probably would come fairly close to an equilibrium price

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for a blanket license.

Q I think we may be at cross purposes on the meaning of competition and I understand you are the economist, Mr. Nathan, but I would like to pursue that.

Do you think when ASCAP bargains with CTN they arrive at a competitive price?

A For the blanket license, reasonably so, yes.

Q For the blanket license?

A Yes. For the blanket license. That's correct.

Q You know, my idea of competition, and correct me if I am wrong, is that if I am a buyer, there are people out there perhaps bidding for my costume or I know that the price being offered to me by seller A may be influenced by his recognition of prices that may be offered by sellers B, C and D, even though sellers B. C and D are not actually bidding under those circumstances.

Is that, in layman's terms, an accurate description of competition, price competition?

A Under the conditions you described, it is. But in our society, we have all kinds of transactions. We have blanket transactions. I was looking at our telephone bill the other day at home and we pay so much and if we are away, the whole month, we still pay the darned bill whether we use that telephone or not.

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Of course, we don't have the variable rates of long distance calls but in our society if every transaction, Mr. Hruska, were as you indicated and we literally bought each service and each item and each use in its fullest detail, we would have pure competition but we would have perhaps a very, very inefficient society because often it is advantageous to combine things and bargain in combination rather than individually and what we have here--not saying that the blanket license is the greatest thing since financial negotiations began but we are bargaining here on an entity, true, absolutely, Mr. Hruska, this is different from each piece and there is no doubt about it.

But society tends to evolve bargaining arrangements sometimes by legal, as we have done--legal or legislative action as we have done under the Wagner Act and the right to bargain of the unions and sometimes by practice but here we have evolved a system which was found to have its excesses or dangers and therefore we had a consent arrangement and--but it is a system and one shouldn't say, well, that isn't collective bargaining, because it is, but it is collective bargaining at one level or one purpose.

Q Is there price competition under this system between separate musical compositions?

A No, sir.

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Q And you said something yesterday about price per unit is not a principal determinant of whether competition occurs, and, according to my notes that is at 3887 of the transcript.

Would you agree, however, Mr. Nathan, that unit prices are essential to the existence of private competition between those units?

A Oh, yes. Sure.

Q Now, in this negotiation you described between CTN and ASCAP, do you think that there are factors brought to bear influencing the parties other than what the competitive equilibrium price is of the compositions in the blanket license might be?

A Yes, I think there are a lot of other factors.

Q Do you think one of those factors might be the cost of an actual consent decree rate making proceeding of which there have never been any?

A Yes, I would think that would be in the minds of the bargainers.

Q And do you think that in this negotiation ASCAP would be mindful of the price that the television network can afford to pay?

A If they aren't, I hope the networks are in there bargaining.

Q That was not my question.

A I think ASCAP would be mindful. They would be silly if they weren't. They would set an utterly absurd rate the networks couldn't afford. It would be self-destructive. I am assuming here that people want to arrive at some agreement. If they do, they have to take into consideration all the elements on both sides in this bargaining.

Q Isn't it in ASCAP's interests to be able to charge CTN in effect what the market will bear?

A For that blanket license, absolutely. If they charged less, then I think their membership ought to change the management.

Q In 1965 you assumed that performance rights were licensed in a competitive market, didn't you?

A Yes, sir.

Q And you made this statement, if I have it correctly, "Let's look at performance royalties. These

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are not governed by a statutory fee and we certainly see no signs of competitive impairment. The royalties are very considerable."

Do you remember that?

A Yes, I do. I think inthat context, too, I kept saying over and over again that it was a ceiling.

Q Mechanical rights were a ceiling?

A Yes.

Q But you assumed performance rates varied considerably?

A Yes.

Q And you pointed out that neither the music industry nor the public have suffered, more likely all have benefited from that competition?

A I think they have.

Q In dealing with mechanical fees, do you recall urging to the Congress that those fees should be set by the operation of the free market place?

A Yes, sir.

Q Do you believe that the same thing is true of performance rights as licensed to television networks?

A Yes.

Q In fact, you see no reason why such prices should not be set by demand and supply, do you?

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A That's correct.

Q That they should directly reflect the give and take of the market place?

A Yes, sir.

Q In fact, you would like to see the free market place operate so as to determine both price and distribution?

A You mean distribution of the rewards to the individuals?

Q I mean distribution, I believe, in a resource allocation sense.

A Yes, I would like to see that to the extent it is practicable.

Q All right. You believe this is healthy economics and also benefits the arts and the sciences?

A That is correct.

Q Just to conclude this section, you believe that the substitution of Governmental price-fixing for a competitive market vis-a-vis mechanical rights or the licensing of performance rights to television networks is incompatible with our basic economic concepts in that it substitutes Government fiat for what should be private enterprise bargaining and decision-making, it does so in a sector which certainly does not fall within the national security for public utility categories and it is a flagrant incursion

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of arbitrary price-fixing where there is no demonstrable need?

A Yes, sir. Those are my words.

THE COURT: Did you say it was un-American?

THE WITNESS: I think this may have been before the Congress. I don't know. Was that the Congressinnal testimony?

MR. BRUSKA: Yes, sir, it was.

THE WITNESS: They wouldn't have appreciated that, your Honor.

Q Why were you so much in favor of a free and open competitive market system in addition to the fact that this is the system under which values tend to be determined over time in the most appropriate manner which you referred to before and the fact that this is the economic system under which the Society has prospered and grown?

A Why do I favor this?

Q Yes.

A Because Ibelieve the -- to the extent that it is practicable for people to negotiate, for people to exercise choices, for the buyers and the sellers to determine the transaction arrangements between them, to that extent I think it is preferable than to have determination by Government of the prices and of the bargaining arrangements.

I think it is preferable from a wide range point of view of resource use, efficiency, economy, choice, freedom of opportunity, rewards and every other -- of many considerations in our system that we regard as very cherished and very desirable and very valuable.

Q Am I correct in assuming, Mr. Nathan , that if all the television networks were to operate on a system of direct licensing with all the copyright proprietors, that that is a system that you would prefer for television networks and these suppliers of music to television networks than the system which is now in operation?

A Well, I -- now you are asking me to draw a distinction between the very efficient -- the efficency aspects and the organization aspects versus the free market aspects.

I would have to answer you by saying that in principle I would favor the networks going on a direct licensing basis. I think that they can function effectively doing it. I am not at all certain but that the networks themselves may come back in two years from now and say this is costing us too much, in terms of all the records and all the negotiations and everything else, and we would like to go back to a blanket license.

If they then do demonstrate that going back to a

blanket license is more efficient and more economical and more fruitful, I would say let them do it.

In other words, I would prefer it competitive, but it may well be that the parties will conclude that the trouble, the arrangements, the inefficiencies are too costly.

Therefore, they get together and bargan on aggregates rather than each little piece.

Q Let me get into some of the reasons why you do prefer the competitive system. We mentioned before resource allocation.

THE COURT: One of the things that bothered me a little about this line of questioning, Mr. Hruska, is the use of the word "prefer." However interested I am in what both Dr. Fisher and Mr. Nathan have to say, I don't think that they would testify or I am here to hear what their preferences are.

As a general rule Mr. Nathan may prefer a certain system. We have got to be more specific.

MR. HRUSKA: I quite understand that. That is why I am turning precisely to that.

THE COURT: Very good.

Q We have mentioned before the concept of the allocation of resources. As I understand this, and correct

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me if I am wrong, the objective of efficient resource allocation is having output production match demand both in types of products produced and quantities produced.

Is that a fair statement?

A That is part of it, not all of it, because the other aspect of resource allocation is on the input side in terms of getting the optimum output from a minimum combination of inputs.

In other words, you could have what you postulated here, that one is going to get energy used for people as they like it, as they choose, in clean natural gas rather than this dirty coal and things of this nature. So that you take your resources to try to fit the needs of the -- the desires of the people. The question comes up on the other side, what is our supply problem and how does one adjust and adapt those inputs in resource allocation that will fit the wants of the people, by the way, in the aggregate as well as individual.

When we talk about resource allocation, we are not just tal-ing about that resource allocation which is desirable and favorable to Mr. X --

Q Of course not.

A -- or Mr. Y, or Mr. Z. It is the allocation

and use of resources that deal with the overall benefit to our society.

THE COURT: For example, the energy problem.

THE WITNESS: Yes. We have problems of liquified natural gas. Everybody agrees natural gas is the cleanest. We have great problems because our natural gas supplies are limited. We are beginning to bring in liquified. It costs five times as much. The Federal Power Commission -- this is very applicable in this situation.

I think, your Honor, the Federal Power Commission is very much concerned now about the pricing of liquified natural gas, should it be on an incremental price or should it be a rolled in price. Many people say put it on incremental. If you put it rolled in, you are taking a very valuable resource and making it available cheap. People will use natural gas where they ought to go to coal. These resource allocation problems are very complicated, Mr. Hruska, and, as I say, you have to take into account what the inputs are as well as gearing it to the output.

Q In analyzing how resource allocation is achieved in a competitive market, is it fair to analogize the purchases made in the market place to votes and the prices

paid to weighted votes?

A This is a very important factor in resource allocation, not entirely exclusive, but it is a very important factor.

Q These weighted votes, dollars and cents paid by purchases for products, indicate to producers of products what consumers want to buy and how much they are willing to spend for those products, right?

A It is a very important factor in that.

Q And sellers who insist on artificially high prices will have business bid away from them by competing sellers?

A That is the tendency as described in the economic principles, and generally it is true.

Q All right.

A I should say except for my wife. She is not an economic buyer.

Q That is probably a problem common to most people in this court.

In testifying about the two cent statutory fee for mechanical rights, you had indicated that one of the reasons you were against that system was that it cut off competition above the two cent level.

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A That is correct, sir.

Q YOu also pointed out, do you recall, that competition occurred below the two cent level?

A It did very intensively, yes, sir.

Q All right.

The fact that price competition did not occur above the two cent level precluded customers in that market place, namely the record companies, from registering weighted votes, right, in using our analysis and lexicon of a few questions back concerning resource allocation?

A It did permit the customers to register those weighted votes above that two cents.

Q Right.

A That two cents was --

Q A ceiling.

A But also compulsory licensing.

Q I understand.

A So that anybody could come to me -- if I wrote the greatest hit of all time this year, anybody could take that and pay me two cents a record and reproduce it. There is no choice above the two cents.

Q No weighted votes above the two cents?

A That is correct.

Q I would like to explore what happens as a result of that.

Am I correct in stating that that condition, the lack of competition above the two cent ceiling, the lack of weighted votes being resigered above that two cent ceiling, precluded efficient allocation of resources as among different types of musical compositions; weighted votes were being registered below but not above?

A I am trying to see how that resource allocation was affected that way.

The most inefficiency was to the composer or of the -- the writer and the publisher of that great hit.

Q It was unfair to them?

A That's right.

Q I want to come to that. Right now I want to focus on the resource allocation.

THE COURT: Doesn't your question mean, Mr. Hruska, that if people could have paid more than two cents for each record --

MR. HRUSKA: And register these weighted votes.

THE COURT: -- that then more of that record would have been produced than were produced?

MR. HRUSKA: No, your Honor. What I mean is this --

THE COURT: What resources would have been allocated differently?

MR. HRUSKA: For example, let us assume that in a truly competitive market with this statutory ceiling price removed record companies would pay a lot more for rock music than they would for country and western music. Country and western they are perfectly satisfied to pay two cents for, let's assume; rock they would pay five cents for.

Now, the fact that the ceiling prevents the copyright proprietors of rock music from getting five cents results in a situation where composers of rock music are not being encouraged as much as they would be if the record companies would pay that five cents.

THE COURT: I didn't ask for a statement, I asked for a question. That is the question you want to ask Mr. Nathan, does he agree with that?

MR. HRUSKA: Yes.

THE WITNESS: Certainly if you had no ceiling you would have -- if you are thinking of resources, you man talent and this chemical that goes into the records -- I think the opposit, your Honor, would have happened on this hit song if more would have been produced. They might have set the price at six cents, royalty rate. That

would have raised the price so that less people would have bought it. It was so cheap -- although we mustn't kid outselves, the royalty rate is a small percentage of the total cost of a record. It is about 7, 8 per cent, 6 per cent.

Q Mr. Nathan, may I interrupt. I think you are off the track. I am not talking about the resource allocation in effect now in terms of sale of records, I am talking about resource allocation in terms of the creation of music. In other words, as among differeing categories of music, my specific example, rock music vis-a-vis country and western.

THE COURT: Then as I now understand your question, and it seems to me that the answer has to be one way, and maybe I am wrong, if record manufacturers were free to pay more to rock composers than they do and they did pay more, would that encourage composition of rock music?

THE WITNESS: Yes, sure, I think it would.

THE COURT: I'm persuaded.

Q The fact that price competition and the registering of weighted votes are cut off above the two cent ceiling, does that preclude fully efficient resource allocation effects as between music and competing cost elements, competing elements that go into the making of a photograph record?

A Yes. Costs do compete with each other and there are all kinds of variables.

I would emphasize here, I think every economist would agree, that the marginal responses to different costs and different prices are quite varied.

In other words, a doubling of the input of one cost may have a completely different response in terms of supply or in terms of demand than the doubling of another cost and the marginal responses--I am sure that more writers would be certainly happier and trying to write more music if they got twice as much as they are now getting

but what the marginal response to a higher price of talent is compared to the marginal response of a physical product is different in each supply item and each demand item has its own marginal curve.

THE COURT: Stravinsky would not, necessarily, let us say, write country and western music?

THE WITNESS: I doubt if he would, even if they increased it ten fold.

Q But as far as you know, there are people who might be more encouraged to write country and western if the price went up considerably?

A Yes, I think there are people that are responsive to economic incentives, most people are.

Q And returning again to the concept of inputs competing with each other, would you agree with this statement.

The process of economic life is such that inputs compete with each other.

For instance, the automobile industry uses steel, they use rubber, they use upholstry and labor. There are wide variations of products that go into the automobile. In a meaningful sense, you have a complex of competition among the inputs in the automobile industry.

A Very well stated.

Q I thought so when I read it, yes, sir.

And another brief statement:

The economic fact is that mechanical royalties are only one element of cost in the total operation of record production.

In the competitive system, if one element of cost rises, any company will try to reduce other costs in view of the rising cost element.

What exists in the record industry is the traditional free or competitive pricing mechanism for singers, bands, instrumentalists, raw materials used in record production and technical devices for everything except the mechanical royalty.

All of these costs competing with each other in the cost price struggle except for the royalties.

A That's correct.

Q Do you agree with that statement?

A Yes, sir.

Q Would you also agree that a comparable situation exists in the terms of the competition among elements that go into a television program?

A Yes, I think that is true.

I just want to say one word, if I may, having said that, because I don't want to be misunderstood.

I am talking now about the elements but one has

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to look also on the demand side as well as the supply side and we are talking about three television networks and hundreds of record producers but certainly the inputs compete with each other.

Q Well, there are only five major record companies, aren't there, Mr. Nathan?

A But there are an awful lot of others that come in. I forget the proportion but there are tremendous numbers of record companies coming in and out and a lot of them in existence at any time.

T s real big ones, that's true.

Q Would it refresh your recollection that the five major record companies have 60 per cent of the business?

A Yes.

I am not--there are very big ones but there are large numbers of others.

Q I would like you to assume that the two cent mechanical rate was a fixed price for all songs and all records.

In other words, not simply a ceiling price; that was the price--2 cents per song per record sold.

A No, I think that that is the way the legislation was but from the early--

Q I am making this up. This is a hypothetical.

A Sorry.

Q I just wanted you to assume this to be the case. It is not the case.

A All right.

Q Now, for the present purposes, assume it to be true.

Now, the misallocation of resources effects that we discussed in the last series of questions concerning today's actual world of mechanicals would be worse under this hypothetical example because competition would be cut off both above and below the 2 cent level; true?

A That's right.

Q And there would be no weighted votes at all?

A Not as between compositions.

Q Right.

A As between records and other--

Q Talking about compositions.

A Within the record area, no.

Q Would you agree that a 3 cent ceiling--I am dropping the past hypothetical and we are on something new--would you agree that a 3 cent ceiling would be better than either a 2 cent ceiling or a 2 cent fixed fee?

A Yes, sir.

Q Because this would increase the flexibility within which the publishers and the record companies could bargain?

A Yes, sir.

Q And it would also increase the size of the arena in which the forces of the free market will have more of a chance to prevail?

A Yes, sir.

Q And by such means, the true market value of music would have a greater chance of being established than is possible under today's mechanical rights system?

A Yes, sir, in musical reproduction, that is correct.

Q I would likeyou to assume that all mechanical rights are pooled into a common licensing agency and that they are licensed to the record companies on a lump sum blanket basis.

I would like you to further assume that a Federal commission is authorized by Congress to hold hearings and set blanket license fees in the event that the common licensing agencies and any record company cannot agree on the blanket fee.

Further assume that the common licensing agencies distributes revenues at 3 cents per song per record sold to the copyright owner of that song.

Further assume, which I think follows from what I've just said, that each use to a record company with a

blanket license is free at the margin to that record company.

THE COURT: You mean it doesn't pay any more for doing it than if it didn't?

MR. HRUSKA: Exactly, because it has already paid the blanket fee.

THE WITNESS: Right.

Q Is that system better or worse than a free and open market in the licensing of mechanical rights?

MR. BLUMSTEIN: Could I have that back? There were some hypotheticals, I had some difficulty following it.

THE COURT: I have some concern, too, about the question itself. If you want to ask whether it accomplished certain things better in another system or have some--

MR. HRUSKA: Let me make it more particular.

THE COURT: Then we will read it back.

(Record read.)

MR. HRUSKA: I'll ask specific questions, rather than the general question.

Q My first specific question is would you agree that in view of the fact that the competitive market was not setting the values for each composition, that these values would not be the most appropriate values?

And I harken back in that connection, Mr. Nathan,

co your earlier testimony where you had said that a competitive market place is the mechanism where values tend to be proved over time in the most appropriate manner.

A Well, there are two parts. First of all, it is clear that this system which you postulate would not set as between the copyright owner and the record, mechanical reproduced record, a price in relation to each product that reflects the market.

That is clearly true.

This does not mean, however, that the price which the consummer might pay, the ultimate user, per record, may not reflect the marketplace because the record companies themselves could then issue this music which you say at the margin is free. They could issue different music items and set their prices so they could cover the blanket coverage but the price per record would vary, depending on the demand and supply.

So that from the consumer point of view, you may get this voting process but you would only get it secondarily.

Q What would the copyright owner see under my assumption? Under my assumption he gets 3 cents per song per record sold.

A He would only see that he gets more money when more of his records are produced and less money when less of

his songs appear on records.

Q In other words, he would get votes but they wouldn't be weighted votes or he would perceive votes but not weighted votes because there wouldn't be any weighted votes?

A That's correct.

Q For that reason do you see a misallocation of resources effect in terms of encouragements as between different types of music?

A On the supply side you may have a misallocation of resources but then you would have to weigh that against the alternatives--that is, here you have a benefit in the sense of the writer, the copyright owner getting payments in relation to the weighted votes but from an economic--

Q Excuse me, sir. I think you may have misstated it. You said the copyright owner would be getting a benefit--

A No. I said one has to draw the distinction between the copyright owner giving up the benefit of being paid in relation to weighted votes against the advantage of a system whereby he doesn't have to concern himself with the negotiation and all the other factors that go on.

Q I am asking, though, when I refer to resource allocation, I am putting the question in terms of the public interest.

Let me back up a little bit and express it to you this way, sir.

The achievement of efficient resource allocation is a public objective, true?

A Yes, sir.

Q It may not be the objective of any one supplier or any one buyer in a market place, in fact, it may be against his objectives because he may be one of the people whom efficient resource allocation would put out of business, true?

A Yes.

Q Now, the absence, or let me put it this way, the inability of the supplier of music to perceive any weighted votes under this hypothetical common licensing agency system we have been discussing for mechanical rights, would effect a misallocation of resources as among different types of music, true?

A Not necessarily because -- I have to -- if you take only the part, Mr. Hruska, which you have given me, namely, the determination of this weighted voting and the impact which it has on the source of supply of music, I

accept that but I must say, on the other side of the coin, sir, that the public would have an even worst misallocation of music and sources and quality if every writer had to spend, and this is a silly observation, I admit, but I am giving you an extreme, if every writer had to spend half his time in business -- namely, negotiating and checking up on the use of his music and collecting the money and maneuvering the price, so that in a sense you might have a distribution system, sir, that would be a worse allocator of use of talent than this other.

So, you know, again, I am saying it is a matter of --

THE COURT: It is a net proposition?

THE WITNESS: It is a net proposition and this is likely to give you the most desirable allocation and this may give you the worst. It may still be that one would tend to give you a better or a more favorable allocation in the public point of view but one can't just take this without taking all these factors into account.

You see, the most competitive sector of our economy, as I see it, is retail establishments. We have supermarkets all over the lot and yet, in many ways, it is one of the worst allocators of resources because it engages in this loss leader business and if a real

economic shopper wanted to practice economic shopping, he could go from Safeway to get this, and we have Giant or A & P to get that, and all over the lot.

Now, from a point of view of weighted votes, this is the ideal but from the point of view of messing up our gasoline supply or, you know, putting some value on the buyers' services, it is a different matter, and all I am saying, it is a very complicated system.

Q Let's make it a little uncomplicated.

Do you think that in the present system of licensing mechanical rights there is anything messed up in this market other than the fact that there is a two cent ceiling?

Do you find any problem with competition occurring below the two cents?

A No, no, I don't. I think it is a very competitive and classical example except for the two cent ceiling.

Q And you favored the elimination of that ceiling?

A I did.

Q And the opening up of the market to competition?

A Yes, sir.

Q And one of the reasons you favored that was to achieve a better resource allocation effect than was possible with this arbitrary two cent ceiling, true?

A True, but I did not favor, for instance, the

elimination of publishers, where -- you might have gone further and said if you really want to get that weighted voting down, maybe you ought to get rid of this intermediary music publishers, which I certainly wouldn't recommend because of the efficiency of that process.

Q Returning to the last hypothetical example, the common licensing agency for mechanical rights licensing to record companies on a blanket basis, do you think that that system would be unfair to some writers and some publishers because they could not get more than the three cent distribution per son per record sold?

A Yes, sir.

Q And do you think it would be unfair to some record companies because they couldn't pay less than an effective rate of three cents per song per record sold?

A Yes, sir.

Q And do you think it would be unfair to the suppliers of elements which competed with musical copyrights because music mechanical rights would be free at the margin to the record companies?

A I can think of some. I think by and large the inputs of the other items that go into it benefit the alternative inputs because of the lack of a marginal cost in the selection of the music, but I think it would -- I

don't know whether it would be unfair. I think it would have some distorting impact.

Q Let me ask you this -- supposing Johnny Green quit ASCAP.

Do you know who Johnny Green is?

A Yes, sir. I read his testimony.

Q You read his testimony?

A Yes, sir.

Q Let's assume he quit ASCAP. All the television networks continued operating under a blanket license, all happy as larks, let's assume, under that system, but Mr. Green, for some reason -- maybe he was slipping a little bit -- he quit ASCAP, and then he went around to the producer or producers of variety programs and he said to them, "I want to license my music to you, I have Got Body and Soul, and I've got these various other standard compositions and I will license it to you for, let's say, $800 a feature use."

Do you think Mr. Green has any problems in competing against other musical compositions which are freely available -- at the margin freely available under the ASCAP and BMI blanket licenses?

A Certainly. As long as the blanket license exists, I agree the network is not going to buy music out-

that they get under the blanket license.

THE COURT: Of course on this assumption they couldn't get it under the blanket license, isn't that right? In the assumed question with regard to Mr. Green, the network could not get his music under the blanket license.

MR. BRUSKA: Could not get his music, no. Could get anybody else's music.

THE WITNESS: You are saying, then, after the expiration of the license, at the time he withdraws, then?

Q No. I am saying that the --

THE COURT: Yes. Well, under legal circumstances, he withdraws his music, whatever.

THE WITNESS: Whatever he can withdraw?

Q Yes, whenever he can withdraw effectively.

A Oh, yes. Then of course there is a competitive matter that exists, that they are -- but the network is making a decision and, economically, that I am paying four million or whatever it is to ASCAP for music and the computer runs and it is worth this or that and it makes its choice whether now Body and Soul is something it very much wants or it uses some alternative choice.

Of course, this is an economic factor.

You say is this disadvantageous or difficult

for Mr.Green. To the extent that music is fungible and to the extent that they have a blanket license, they are not going to pay him. There is no doubt about it. They are going to use that which is available under the blanket license.

Q You think there might be some circumstance in which they would pay Mr.Green?

A Oh,yes.

THE COURT: If we took the classical composers, for example, wouldn't you think there might be a chance that the fee would be paid?

THE WITNESS: That is why I said it is fungible. Certainly in the classical area there is a lesser degree of real substitution. There you do have a far greater --

THE COURT: If you want to put on Petruska, you put on Petrushka.

THE WITNESS: That is correct.

Q And if you want to put on Body and Soul, you have got to put on Body and Soul?

A That is correct.

Q But Mr. Green would be at a competitive disadvantage?

A Oh, he wouldn't be at a competitive disadvantage, if you wanted to put on his song.

THE COURT: If they wanted to.

THE WITNESS: Yes.

(Luncheon recess.)

2:00 P.M.

R O B E R T R. N A T H A N resumed.

CROSS-EXAMINATION (continued)

BY M R. HRUSKA:

THE COURT: Good afternoon.

Q Mr. Nathan, I would like you to assume these facts to be true: Assume that all music performance rights are pooled together into a common licensing agency and licensed to users on a lump sum blanket basis, and assume that a Court is empowered to set blanket license fees if the parties cannot agree on those blanket license fees, and assume that the common licensing agency distributes revenues after expenses at the rate of $800 for each feature use on a television network and lower distributions for other network uses and uses by other users, that is distributes to its members.

Would that system preclude the determination of values in the most appropriate manner?

MR. BLUMSTEIN: Your Honor, what does he mean by values?

MR. HRUSKA: Values of the copyrights that are pooled in the agency.

THE COURT: You mean the market value, the fair value?

MR. HRUSKA: Yes, preclude the determination ofthose values being made in the most appropriate manner.

THE COURT: This is pretty complicated. Would you read me back the original question, please.

(Question read.)

A Well, the most difficult problem I have with this question, of course, is the question of appropriate, is the word appropriate.

If you said would that preclude the setting of the prices or market values, if you will, at those levels and those patterns and those structures which would derive from a direct licensing per composition, then the results would not be the same.

Q And not be as appropriate?

A Well, the problem with appropriate in this circumstance -- if you come back to what I said about -- this morning about the private sector and the competition and the benefits of competition and the like, I favor that, but I also emphasized that the question is one of practicality and one of organizational problems and one of how one uses his time and how persons engage in making economic decisions.

If all of those were just washed out, then I would say that this result would not have the economic

characteristics that we normally associate -- I will say economic benefits that we normally associate with the free competitive operation.

Q This system which I described in the hypothetical example I asked you to assume would be unfair to some suppliers, would it, because they couldn't get more than the $800?

A Well, it would be -- it would represent a compromise on that person's part in joining ASCAP, that he knows that his feature writing would not yield more than $800. This would be a decision he would make in joining ASCAP. I would hope that as a member he would manifest his views as to whether that $800 is an appropriate or whether it ought to be 1500 scaled down. But these are decisions that will be made collectively by the Society and not by each individual except insofar as the individual has his input in as a member and his input in his decision whether or not to be a member.

Q Suppose the individual you are talking about has no realistic choice but to join ASCAP, do you think under those circumstances a limit on his distribution for each use of $800 would be fair in the event that in a free and competitive market, free and open market, he could get

more than $800?

A Well, that would have to be balanced off, Mr. Hruska, as to what the offsetting cost benefits would be in the free and open and competitive market.

I think in almost every instance, in economics, we recognize that there are costs in certain institutions, channels, relationships, things that we -- things we decide how to do. We know there are costs as well as benefits.

I think that individual, if he had no choice at all, this is it or nothing, and you forget about even writing music, this would be a very serious constraint. I would think that exclusivity of that nature would not be very desirable.

Q Do you know whether a writer of music has any realistic choice as to whether or not to join ASCAP or the other licensing organization, BMI? He can chose between the two. The question is whether he has any realistic choice of not going into either.

A He has SESAC, and the representative of SESAC was unhappy yesterday when I referred to SESAC as foreign.

Q Excuse me.

Do you know whether SESAC has writer members or whether SESAC is exclusively a publisher organization?

A I don't know whether it is exclusive publisher. I gather they do handle performance rights mainly in religious music. This is what he said. I don't know much about SESAC.

Beyond those, except for a writer not being able to directly license his music, I don't know of any other choice. I would hope he would not be precluded from direct licensing if he wants that.

Q Now that you have studied the music industry at least in performance rights, Mr. Nathan, would you conclude that a writer who did not join either ASCAP or BMI would be at a competitive disadvantage?

A Well, he certainly--certainly if his music is not so unique that there isn't substitution music available, he

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would--he would be at a competitive disadvantage.

Q Let's get back to the hypothetical facts which I had asked you to assume, and ask you whether that system is unfair to the television network buyer in view of the fact that the buyer cannot pay less than an effective rate of $800 a use, feature use.

MR. BLUMSTEIN: Who is the buyer in this situation?

THE COURT: Television network.

MR. HRUSKA: Yes.

A I didn't understand that the buyer had anything to do with the distribution rate. I thought you said to me that the buyer had negotiated a blanket rate which was related then to a court decision--subject to court approval or disapproval of setting the rate, but the $800 had only to do with distribution within the society on performing rights, but not the network would pay that $800 or any fixed relationship.

I thought that was the distribution mechanism.

Q Let me change the facts slightly. Let's assume that instead of paying a blanket rate the television network user does pay $800 for each feature performance, and that is the rate negotiated with this common licensing agency.

Under those circumstances do you think that that

is a fair result?

A Well, this obviously is a different set of assumptions. We don't have the blanket license with either a fixed amount, fixed proportion. Now we have a negotiation by categories, let's say feature and others.

Q Yes.

A No, I really don't think--I don't think this raises the issue of fairness in an absolute sense because, again, buying goods and services in our society in very, very substantial amount of transactions concerning buying groups and not every individual product separately.

This may be an extreme example, but I go and buy a car. I'm buying a car. I could conceivably go buy four wheels and a generator and a distributor and a transmitter.

THE COURT: That's what the hi-fi buffs do.

A A lot of people do that. This then poses a very real question, is it unfair to buy an assembled hi-fi set when buying the assembled aggregate doesn't permit you to pay for one component there of more than the inherent limit by the dealing--dealing with the aggregate?

THE COURT: I'm sorry, gentlemen, to complicate life even more than it is already complicated. I wish somebody would define, or both of you would define for me what you mean by the use of the word fair and unfair. I would ask

Mr. Hruska in the first instance.

MR. HRUSKA: I will allow Mr. Nathan to do it if he would like to.

THE WITNESS: Your Honor, fairness in economics really has no absolute place in economic terms. In economic fairness has to do with opportunity and with the ability to determine what one charges and to bargain for what one receives relatively freely so that as one makes his decision and takes all factors into account, there is no preclusion to a reasonable arrangement being arrived at.

We never can quite test fairness because to the one who likes certain kinds of food, the price can be very high and one who hates that kind of food is too expensive at ten cents.

We are dealing now with tastes and subjective considerations.

The principal limit is the process and the mechanism that permits non-discrimination and real opportunity, and that is a limit that is essential in what we regard as fairness in economics.

THE COURT: Thank you.

Q Let's get back to one of these real elements, mechanisms.

We are dealing, then, with a system in which music is pooled, a common licensing agency, it licenses on a blanket basis and it distributes at $800 and lower rates as I previously described.

Now, does that system preclude efficient resource allocation as between different kinds of musical compositions?

A Well, it would not be, I'll take the word--it would preclude an allocation of resources as between different types of music that would be arrived at by pure competitive pricing of every product.

Now, how--

Q Every song?

A Every given song.

Now, how much difference that might be would depend on what I call the marginal aspects. We must remember that under the present system and the system that you have given to me, Mr. Hruska, there would be variable payments with performances.

Q A payment for a feature use which was different from a payment for the background use, yes, that also. But number of performances. A man with a hundred feature uses

will get more than a man with one.

We now have two elements. We have a differential rate set by different kinds of music and now we also have a different income associated with the quantum use of that music.

We do not have, however, a third element, namely, the setting of the--the weighting of that quantum by the price for each song differently.

Q We have votes but no weighted votes?

A Well, we have classified votes. We have classed votes. We have a weighting by clan, feature versus--

Q A feature vote but no weighted feature votes?

A We have a partial weighting but not a complete, absolute weighting and how much the differential would be from that partial weighted voting to a total is hard to tell.

Q You couldn't tell unless and until you had a competitive market in which the weighted votes would be registered?

A That is correct, and you could conceivably do that and you could literally get so much cost in doing that in the total music area that the net would be a lot less than the present net and while you would have differences among groups--I can introduce another great complication, Mr. Hruska.

If I may say, what if the network shows took all the feature songs out of Broadway comedies and that happened to be the networks selection, which is fairly manageable but the local radio stations become involved in a much bigger repertoire. It is conceivable that the costs involved in the monitoring, the policing, all the other things in the radio stations then could make for a lesser net than the others, so that you offset them.

Q Let's remove radio stations, then, from consideration and focus entirely on television networks.

In the distribution of $800 for each feature use, there we would agree, would we not, that the resource allocation effect steming from the unweighted votes as it were, would not be nearly so desirable from an overall economic policy standpoint as would be the case if the votes were weighted as they would be in a competitive market?

A Well, if I could substitute the word desirable to say that in terms of economic determination, that distribution would be considerably different, I would agree that you would have a different weighting and it would be--this system of yours would be less reflective of marketplace forces than the alternative of price per composition.

Q Than the alternative of the competitive market-

place?

A That's correct, sir.

Q And in that case, you would not be worried about the net being less?

A Just the net portion, no, not really.

Q Do you agree with this statement, Mr. Nathan:

The unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions?

A Yes, sir.

Q Yesterday in your testimony you mentioned the phrase "Freedom of entry" and I believe you said that the present ASCAP system provides freedom of entry.

Did you mean by that statement the present ASCAP system provides freedom of entry into ASCAP or did you mean something beyond that?

A No. Into ASCAP.

Q Into ASCAP?

A Yes.

Q Now, in normative economic analysis when you use the term freedom of entry, don't you normally mean a freedom

of entry into a competitive marketplace?

A Freedom of entry into my productive activity. Well, I use freedom of entry also in terms of unions. I think freedom of entry, of the right to join a union without really discriminatory type predictions is an important element of our system, too, but very, very commonly, because this is the more common reference, is the freedom of entry very often used, the freedom to enter into an occupation, a profession, a production, an enterprise.

That is the most common use because it is the most common application.

THE COURT: It means more than only legal freedom to enter, doesn't it? It means that you have economic conditions such that there is a realistic possibility of being able to enter and survive.

THE WITNESS: Well, your Honor, that's true. Of course, immediately, then, as with almost everything in economics, it becomes a different meaning in a different environment. The freedom of entry into the grocery store business is quite different from freedom of entry into the steel industry, or steel warehousing is quite different from basic steel but it is more than legal, yes, and for instance, if you had a preclusive financial market, where the banks got together and said, we are not going to lend any money

to people who are under 5'foot 7 and you didn't have any law but this would certainly be a preclusion of freedom of entry because who starts without any money or at least without some loans?

Very few enterprises. It is a broad meaning, yes, sir.

Q Here you are describing freedom of entry into this ASCAP combination.

A That's correct, sir.

Q Isn't it also correct that as a practical matter, there is no freedom to enter?

MR. BLUMSTEIN: Into what?

THE COURT: ASCAP or BMI or SESAC, I take it?

MR. HRUSKA: Yes, sir. Not SESAC, I think, because of the fact that SESAC is a publisher organization.

MR. BLUMSTEIN: Wasn't that question asked and answered already, your Honor? Couldn't we make some progress here?

THE COURT: I don't know if we can make progress, because I don't know what your definition of progress is.

In any event, I understand the question and I think the witness --

A For all intents and purposes --

MISS KEARSE: I just wanted to correct Mr. Hruska's statement.

SESAC does have writers.

MR. HRUSKA: Then it is a new development.

Q You were saying?

A For all intents and purposes, with the existence of blanket licensing, the buyers will not tend to buy an individual product whenthey have a blanket license available unless that product is very unique.

Q Now, you described also, yesterday, certain advantages as you saw it of the ASCAP system, the present ASCAP system.

THE COURT: May I, before you go on to that, I understood the thrust of Mr. Hruska's question and I think your answer to it was a guarded yes.

But, am I correct in understanding, so that we get these esoteric concepts properly in focus, that although one might be willing to accept the proposition that realistically a writer is free only to join ASCAP or BMI if he wants to sell his music, there is a difference between that proposition and the proposition of, let us say -- you used the example about -- an instrumentality like a trade union which has discriminatory or preclusive rules and what you were trying to bring out yesterday was not necessarily that there were more choices than ASCAP and BMI, but that at least somebody in the profession had no obstacle to becoming members of those organizations, right?

THE WITNESS: Yes, your Honor. That was my emphasis on the freedom of entry aspect.

Q YOu had described yesterday what you believed to be advantages of the present system.

If the present system were changed only, only to the extent that the prices charged by ASCAP to television networks were negotiated per use prices in the sense of let's say $800 for each feature use and lower prices for other categories of use, which if any of the advantages that you ascribe to the system could not be achieved?

MR. BLUMSTEIN: Your Honor, I am going to

Object to that question. Is Mr. Hruska talking about his per use proposal in this case or about something else?

MR. HRUSKA: No. Something else.

MR. BLUMSTEIN: Could you please define the something else?

MR. HRUSKA: I thought I had.

THE COURT: I understand the assumed facts but I don't understand the question part of it.

I understand Mr. Hruska to be asking about a situation in which things are exactly as they are except that the negotiations between the networks and ASCAP is not on a blanket basis but is on what, he used the phrase, let's call it per piece basis, for example of $800 for each feature use of a song.

MR. HRUSKA: Per performance, I think is the word.

THE COURT: That is the set of assumed facts, is that correct?

MR. HRUSKA: Yes.

THE COURT: What I don't understand is the question that followed the statement of facts.

Q Which of the advantages that you yesterday attributed to the present system could not be achieved, if any, under the system I have just outlined.

MR. BLUMSTEIN: Your Honor, my problem is I want to know whether it is clear that under this proposed new license, with whether the per use or the per piece rate, ASCAP and CTN will do the licensing, as opposed to direct licensing outside of --

MR. HRUSKA: Yes, exactly.

A In other words, as I understand it, there will not be a blanket license, blanket fee.

Q There will not be a blanket fee, but there will be blanket access fee, a performance fee.

A And ASCAP would continue to handle the distribution, the monitoring, the policing and the like.

Q Everything remains the same otherwise, correct?

A If they could arrive at a negotiation for a set of rates on different categories, I couldn't see -- I think you would have the advantage of the policing, the advantage of the central negotiation, the advantage of the monitoring, the advantage of the simplicity and orderliness of distribution.

The negotiation would be a difficult one because it would be a negotiation for diverse groups, but I don't think it would be beyond manageable levels.

Q Yesterday you described certain non-price elements of competition, competition in other than price.

A Yes.

Q Do those non-price elements of competition occur in the mechanical rights field, above the two cent ceiling?

MR. BLUMSTEIN: Your Honor, on direct, I don't think I asked a single question about the mechanical rights field. We spent a good deal of time on it this morning. Could we stick to the direct examination.

MR.HRUSKA: This is probably the last question I will have on mechanical rights.

THE COURT: I am glad to hear that, Mr. Hruska. But, Mr. Blumstein, I don't think the questions should be asked on cross-examination based solely whether you asked questions about mechanical rights, but whether questions about mechanical rights will cast light on the witness' views in regard to the performance rights and I think they on occasion do.

Do you want to repeat the question, please?

(Question read.)

A Well, certainly the quality of music would affect the quantity of record printings and sale above the two cent -- which otherwise would be salable above the two cents.

Q Competition between copyright proprietors?

A Copyright proprietors -- well, one of the non-price competitive elements is the promotional task and I certainly think that the publishers would be at least as aggressive in their pursuit of the use of music at that two cent fixed rate or ceiling rate as they would for music for which prices had been bargained below it.

As a matter of fact, they might be more aggressive because if I had a hit song and I thought I could get more than two cents, but the law precluded me from going above two cents, I would try to get the maximum , maximum to use so that my income would be greater.

I think I would put a greater effort because I think I would have more responsiveness through my promotional efforts because the price is flat.

I can't think at the moment of other elements non-price.

Q I may be wrong, Mr. Nathan, but I believe yesterday you stated or at least implied that in the music performance rights field price competition was not the only or, indeed, the most important determinant of whether or not competition occurred.

Do you recall that?

A Yes, I recall. I don't remember my exact words,but I recall that discussion.

Q You pointed in that connection to these non-price elements which you felt in performance rights were a more important determinant as to whether or not competition occurred.

A Could you refresh my memory as to what some of those elements were I mentioned. I have been through --

Q The only one I could figure out, sir, was the one about copyright proprietors, inthe sense of exploiting their products, competing on a product level rather than on a price level or product quality level rather than a price level.

A Yes.

Q Since those non-price or that non-price area of competition exists in mechanical rights above the two cents ceiling and since you advocated to the Congress that that ceiling ought to be removed sothat the price element

aspect of competition could be injected into that market, how do you reconcile that with your testimony that it is more important in the performance rights field that these non-price elements are a more important determinant in the performance rights field?

A In the first place, I would like to state very strongly that I see the negotiating process, the channels, the arrangements dealing with mechanical reproduction of music as on the whole relatively simple. You have a set of publishers who represent a very large number of writers who are negotiating freely with a five big, let us say, recording companies.

Q And hundreds of others.

A And hundreds of others. It is a one shot operation. They make the negotiation, they set the rates, 1-3/4 cents, 1-1/2 cents, you have Economy Records, you have Record of the Month Clubs, all kinds of variations and this is a simple negotiation that is pretty much defined and concluded at one point.

The result is that straight price competition at that particular area makes a great deal of sense.

As we come down to music performance rights, we have here a whole variety of arrangements, and again I have to distinguish -- I will distinguish the networks

because as I have said yesterday and this morning, I think that moving to a direct licensing with all of the variations you want, going right down to per song is, in my judgment, manageable. But when you move away from the television networks, the complexity, the multiplicity, of arrangements is so great that these other factors come into being and these other factors than pure price competition, namely, the arrangements and the mechanisms and the relief of the writer from concern about economic matters and following up and feeling concern whether he is getting paid or not getting paid. All these elements enter into the relationship which just do not get involved in the mechanical reproduction negotiation.

Q But in determining whether or not competition is occurring in a sense meaningful to normative economic objectives in the television network field, would you here agree that the existance or non-existence of price competition is quite important and determinative?

A I think it is an important factor generally. There is no doubt about that.

Q And determinant as opposed to the field outside of the television network area?

A See, if I may, I didn't go into this before, Mr. Hruska, but when you are dealing with music performance

rights, you have an inter-relationship of different -- let's call it modes or paths of music use that all have an impact.

What happens with music use on television can very importantly affect what happens to its records sales. What happens to its records sales can have an important impact on whether the radio stations play it or not, whether the radio station may come back and have an impact elsewhere.

What one has is a complexity on the -- even on the user's side which makes the price element less definitively identifiable in the network decision than if it were a specific event in and of itself.

Just as an example, I can envisage -- if you get your direct licensing, which is what is being proposed here, it is entirely conceivable that some publishers or writers may be willing to make music available to the network on a very low, by any standard rate, just to get the exposure if that writer has a conviction that the exposure by Carol Burnett will so excite the listener that they will just all run out the next morning and get records and want to call their disk jockies and saw, get it for me. Here it now becomes a very strong economic element which far overshadows that price in that negotiation with the network.

That is why I emphasize the complexity of it.

Q I want to get to that subject in a moment.

A All right.

Q I don't want to lose this particular point. Let me rephrase the question this way. Do you agree, Mr. Nathan, that what you said yesterday regarding whether or not a price competition was a determinant as to whether or not competition was occurring in a market has no application to the licensing of music performance rights to television networks?

A No, sir, I wouldn't go so far as to say it has no role and it is not a determinant at all. It has an element of consideration just as it has in the blanket licensing.

Q I am afraid I have not made myself clear. Let me try again.

You made a statement yesterday, Mr. Nathan, that price competition is not a determinant of whether competition is occurring.

MR. HRUSKA: Rather than hold up on it now, I will pull it out later and do it.

THE COURT: All right.

Q Let me turn to what you said regarding phonograph records.

Do you have any evidence that you could cite at

the moment to indicate that a television network performance of a song will increase the sales of the phonograph records of that song?

A No,I have no direct evidence. I ran across that in the testimony as I read, but I have no evidence myself, sir.

Q Did you ever hear of a man named Walter Dean?

A Yes.

Q Did you read his evidence, his testimony?

A I did get a summation of that from my associate. I didn't read itmyself.

Q You made no study of the impact on sales of phonograph records in the stores of any television network performance?

A No, sir.

Q Do you have any evidence to indicate that a television network performance will increase the sale of the sheet music?

A I have no evidence.

Q Or movie rights?

A No such evidence.

Q And you have never made any studies of either point?

A No, sir.

Q Are you aware of the fact that musical compositions are generally popularized by radio station use before they even reach television network use?

A It wouldn't surprise me in view of the multiplicity of radio stations and tv, very large number of hours that they devote to music use.

Q. Are you aware of the fact that one television network feature performance of a song will frequently deter future television performance of the same song?

A Yes,I would expect that and I read it. Networks don't like to have people believe that they are just adopting the same songs the same week, the same kind of singer as another network has. It would lose some sense of distinction for them.

Q Do you know how many times during the course of, say, the last year or during the course of any period of which you have knowledge, there was a feature performance of a published composition on a CTN program that was not already a standard composition--you know what I mean by standard?

A Yes.

Q --or a song that was at or near the peak of its popularity, in other words, on the charts?

A I don't know.

Q All right. I think perhaps there are a couple of propositions on which we can agree or at least let's try to.

Do you agree, Mr. Nathan, that the market for the licensing of performance rights to television networks will function perfectly adequately if ASCAP and BMI got out of that market?

A Can I have that first part of that read?

(Question read.)

A Well, again I have trouble with the words perfectly adequate. I think the market would function if BMI and ASCAP were not even in existence, just disappeared. But this does raise questions of the mechanics of channels for use.

Of course, if BMI and ASCAP stayed in existence for all other purposes, namely, local television and the like, it is possible that this program--this proposal in your limits of per use licensing might make available to the individual writers or the publishers and to the television networks whatever expediting mechanisms they have. I think it could function. I think that market could function.

MR. HRUSKA: Could you read back the last three sentences of that answer.

(Answer read.)

Q You gave certain testimony, Mr. Nathan, about bargaining power, bargaining power of the producer of a television program on the one hand and the proprietor of a copyright or the composer of music written for television on the other hand.

A Yes.

Q That is what I would like to explore at the moment with you.

I would like to start with publishers.

I would like to take a common situation. A published song is selected by a producer for a production number, and I would like to list a number of factors and I would like to ask you as to each such factor whether you think it falls on the producers side of the bargaining power scale

or on the copyright proprietor's side or the publisher's side.

THE COURT: You mean more faborable when you say on one side or the other?

MR. HRUSKA: Precisely.

Q The first fact for that kind of springs to my mind is that the song is copyrighted and it has some difference from other songs.

MR. TOPKIS: Those are two factors.

THE COURT: It has to have some difference to be copyrighted.

MR. HRUSKA: Exactly.

MR. TOPKIS: No, sir.

Learned Hand once observed if something--

THE COURT: All right.

A Obviously if the music is not copyrighted, the writer who comes and offers something that is copyrighted is in a weak position. He has his own product and nobody can use it who doesn't negotiate and pay him.

So he is coming as a seller of his own product and, therefore, he has strength because it is his own product.

THE COURT: On the system we are going on, that is on the side of the writer.

Q That is on the side of the copyright proprietor, is that right, Mr. Nathan?

A Yes, sir.

Q Here, of course, we are dealing with copyright proprietors who are publishers because we are talking about published music.

A Yes.

Q All right.

The composition selected is likely to be a standard or a song at or near the peak of its popularity so that it would have had a demonstrated record of publishing acceptance.

Is that a factor which falls on the publisher's side?

A If it is at the peak of its popularity, I think this is a strong point from the seller's side.

Q How about if it is a standard?

A I think it is a very strong point on the seller's side.

Q By the time the producer contacts the publisher, the producer will already have invested a substantial amount of time in formulating the aid for the production number for which the song has been chosen and for the process of selecting the particular song.

On which side of the scale does that factor fall?

A If he puts in a lot of time and spends a lot of time preparing just for the use of that song and he cannot use his arranged activities and other songs, he would be at a disadvantage and the writer would be in an advantage.

I suspect an economic producer would consider alternative possibilities as well as have in mind what he might pay.

Q That wasn't my question, Mr. Nathan. My question was not the extremes, did not encompass either of the extremes you mentioned, but was really in the middle.

Let me repeat it so it is quite clear.

By the time the producer contacts the publisher he will have already invested a substantial amount of time in formulating the idea for the production number for which the song has been chosen and in the process of selecting the particular song. Do not factors into your consideration of whether this falls on the buyer's side or the seller's side of the bargaining powers scale that the producer has no other choice of production number or no other song choice, just take the hypothetical as I gave it to you.

A If you give me the hypothetical that the producer has no other song choice--

Q No, exclude that.

THE COURT: He just says he spent a lot of time and effort.

Apparently it is not irreversible.

THE WITNESS: Not irreversible and not necessarily known how much is by the writer.

Q Take that as a factor. Which side of the scale does it fall?

A It may fall slightly on the seller's side.

THE COURT: I suppose there may be some other factor that does not fall on either side?

A Yes.

THE COURT: Or fall equally favorable to both?

THE WITNESS: Yes, and also it depends on--one has to say when it is favorable or unfavorable--in relation to what price?

THE COURT: I take it from the interchange so far there's an implied definition of favorable meaning that that factor puts whoever it is you say it favors in a more favorable bargaining position than he would be if that factor didn't exist.

THE WITNESS: Or than he otherwise would be.

MR. HRUSKA: I don't perceive a distinction of what you said and what his Honor said.

THE WITNESS: If the producer were to bargain

before he has put in all this money relative to--as I say, that advantage would change if the circumstances were different.

I'm not talking about the producer here and the writer there and who has the relative advantage, but the writer at one point will be less advantaged than he himself will be at another point.

THE COURT: I understand what you mean.

Q The next factor, Mr. Nathan, since the other limits of the production number cannot be acquired until performance rights to the song are licensed and since the entire production schedule for the program is exceedingly short, the producer is under a considerable time pressure to close the transaction.

Which side of the scale does that factor fall on?

A Obviously whenever anybody is under the time pressure to close, and all other things being equal will give the advantage to the other side, all other things being equal.

Q Next factor--the particular network use involved in the transaction will substantially diminish the possibility of another network use of that song for some considerable period of time.

A The advantage is on the producer's side.

Q Excuse me?

A The advantage is on the producer's side.

Q Here you think this is a factor which is on the producer's side of a--

A If I understand you right, that there will not be a further use of that composition--

Q No, no. If this producer and this music publishing corporation, who are in the process of negotiating for performance rights to this composition, if they include that negotiation and the producer goes ahead and uses the song, let us say, on the Carol Burnet Show, that will deter future use of that same song on, let's say, the Julie Andrews Show, and other television network prime time variety programs for some considerable period of time.

Does that factor fall on the producer's side of the bargaining power scale or on the side of the music publishing corporation?

A I can't answer that . I would have to balance by your giving me a set of probabilities in terms of the

alternative uses by the seller of the music.

Q Let's say the probabilities are 80 per cent that that use on the Carol Burnet Show would deter a use which otherwise would have occurred on all other network prime time variety programs for six weeks.

Is that specific enough?

A Yes, that is specific enough. 80 per cent preclusion for six weeks.

THE COURT: Is that the same as a hundred per cent for 4.8 weeks.

A No, that would be over six, your Honor. Well, 4, it would be--that's correct. Well--

Q The question is simply which side of the scale does that factor fall on.

A Well, I think the degree on either side is so subjective as one--one is bound to think subjectively if his alternatives in the weeks you have given are fact. If the man knew that he had only an 80 per cent chance of using it in the next six weeks, I think he would have an advantage--

Q His chances of having it used in the next six weeks have gone down 80 per cent?

A That's 20 per cent residual.

Then I think probably I would say it would be with the seller in that negotiation, slightly.

Q I would like you to take another common situation and that is a song selected by a performer either for a production number or for a non-production solo.

Now, if the song is selected for a production number, I take it you would agree that all the factors which we had or which we have just gone through with respect to the straight production number that would fall on the sellers side of the scale, would, in this situation, also fall on the sellers side of the scale.

A Yes.

Q And would you agree that there is an additional factor in this circumstance that would also fall on the seller's side of the scale, namely, that if the producer is unable to license the music selected by the performer, that he will run some risk of losing that performer?

A Well, there would be a remote risk as I read it. But I must say in the bargaining here, there is one tremendous advantage that falls with the producer in this aspect and that is that he knows about this star performer and what that star performer wants but presumably the publisher doesn't.

THE COURT: That's true of many of the factors.

THE WITNESS: I think they don't know what--you see, this is one of the problems of these hypotheticals. If

each one knew then I think the way I've expressed it would be the right one.

Sure, if I were a publisher and I knew that Carol Burnet--

THE COURT: It is like the puzzel with the people that have the marks on their forehead, you don't know who has the mark.

A That's right. You don't know who--but I think that a lot of these must be predicated on assumption of full knowledge.

Q Well, let us assume that--

THE COURT: Can we assume in another ten minutes?

MR. HRUSKA: Surely.

(Recess.)

Q I believe you said before the break, Mr. Nathan, that all those factors that we had discussed back on the music publisher's side of the bargaining scale would continue to reside there only if the music publisher knew about them, was aware of them.

A Yes. I assumed equal awareness.

Q To the extent that these are factors that are favorable and contribute to the bargaining power of the music publisher, don't you think that the music publisher will make it his business to find out about whether those

factors are applicable to the particular transaction on which he's been called by the producer?

A To the extent that he can and he is an astute and effective business operator, he would make an attempt to learn all of this.

Of course, I think everybody in bargaining tries to know everything he can about all the situations so that he can manouvre and arrange and massage the negotiation to his advantage.

Q Right, and take advantage of whatever bargaining power he possesses in a given set of circumstances.

A Right. That's the game.

Q Did you read the testimony of Alberman and Marion Mingle regarding the dynamics of bargaining for motion picture performance and synch rights?

A I did not; I'm sorry.

Q Do you know, independent of whether or not you read that, do you know whether in those negotiations for movie rights the publishers, A, do inquire into the type of use for which the music is being licensed, who will perform it, the circumstances surrounding the performance, its importance to the film, the kind of film it is, et cetera?

A I would assume they would inquire and try to find out about every single one of those.

Q And do you know whether or not they are successful in learning those things in those transactions?

A I really don't know. I have no reason to judge either way and if they are successful, I would accept that.

Q You take an astute businessman like Mr. Chiantia--you read his testimony, I take it?

A Yes.

Q Based upon whatever you could divine regarding Mr. Chiantia's attitudes and business acumen from that testimony, what do you think his reaction would be in the case in which he asked a producer of let us say the Carol Burnett Show about facts concerning a particular use under consideration and that producer lied to him, told him the music was going to be used in some minor way and it later turned out that the music was used in a very major way on the program.

MR. BLUMSTEIN: I can understand where this would be a proper question to Mr. chiantia but I don't understand how Mr. Nathan can answer it.

THE COURT: I sustain the objection. I think my guess would be as good as Mr. Nathan's, with all due respect, having heard Mr. Chiantia and so on.

Q Now, we were also talking before the break about a situation in which a performer on a television

network variety program had selected a composition for his own performance on the program.

Have you made any study concerning the extent to which performers' willingness to appear on television network programs depends upon their ability to sing the songs that they want to sing?

A No, sir.

Q Any study to determine the extent of other opportunities available to such performers? That is opportunities outside of the particular program on which he has been asked to appear?

THE COURT: You mean the extent to which a performer would have another opportunity to appear on another show if he couldn't get the song he wanted on Show Number 1?

MR. HRUSKA: On another program, at a club in Las Vegas, in a movie, any other opportunities that might be available to performers of that stature.

THE WITNESS: I have no basis for judgment in that respect.

Q Have you made any study of the importance of particular performers, stars of a musical variety program or guest stars to the commercial success of the program?

A I have not made a study of that nature, no, sir.

Q Any study regarding the extent of competition among producers of network programs for the services of such star performers or guest star performers?

A I have not made such a study.

Q I would like to take another example and this one would pertain to a published musical composition selected for background use on a television program and I would like to name a number of factors and have you determine, sir, if you can which side of the bargaining power scale the factors fall.

A Could I ask, is that background not prepared for that specific program?

Q Precisely, yes. This would be a previously published piece of music which the producer of the particular television program wants to use on the program as background, rather than feature.

Now, we start again with the fact that the song is copyrighted and let's assume it is different from all other songs. I take it you would agree that this is a factor which falls on the publisher's side of the scale?

A Yes. He is only one that has product to offer.

Q And the second factor is that the song will be a standard composition recognizable to the audience.

Is this a factor which falls on the publisher's side of the scale?

A Certainly it adds to the bargaining power of the copyright owner.

Q The third factor -- the song will not have been chosen unless it is particularly descriptive, uniquely descriptive of a certain time or place or mood or identifies a person so that a relatively narrow range of substitutes are available to perform that job?

A Yes, well, if I think -- I think if the copyright owner knows that, he would be at an advantage.

THE COURT: Well, with some kind of music he would be likely to know it, wouldn't he, if it is Yankee Doodle Dandy or something?

THE WITNESS: If he knew what the show was, yes, sir, what the nature of the program on which it was going to be used, he would know, yes, sir.

THE COURT: I should think there would be some assumption that the music would be likely to be, to have some unique characteristics for which it was chosen?

THE WITNESS: But I think, you see, I suspect --

THE COURT: Would you agree that that uniqueness is something else again?

THE WITNESS: That is the question of degree. If

it were a patriotic or a show that had a patriotic theme with patriotic music, but the song, Yankee Doodle Dandy--Johnny Jones, would be an important one, but it wouldn't be nearly as unique, if it were -- if he knew that it was a show in which that particular instance in George M. Cohan were a factor and he knew he really had a unique product.

But if it was just a patriotic song, he would consider, what is my bargaining strength, and use the most he had and I think he would have considerable bargaining strength if it was unique.

Q To follow this line a bit more, if a television producer told a music publisher: I want to use Moon Over Miami as a background, in a background use --

A I think he would assume that is a song about Miami and he would --

THE COURT: Or a moonlight scene.

A I suppose Miami has advantages in moonlight over someother place.

Q With respect to published music, can you cite any evidence to the effect that the producer's bargaining power would be higher than that of the publisher in a direct licensing situation?

A Evidence?

Q Yes.

A No, I can cite no evidence. I am not familiar with the details of negotiations. I can give an economic view on that situation, but I have no evidence about specific bargaining at all between a producer and a publisher on published music under a direct license arrangement.

As a matter of fact, up to now there has been so little or nil direct licensing, I don't know who would have that evidence.

Q I would like to turn now to music written for

the program.

Have you read the testimony in this case regarding the special skills required for the writing of such music on cue and in the limited amount of time available?

THE COURT:Do you want to refer to somebody's testimony in particular?

MR. HRUSKA: Yes,your Honor. I would refer to the testimony of Bob WRight, Duke Vincent and George Sunga. Also I believe the point was covered by Mr. Segelstein. I am informed that that is it.

MR. BLUMSTEIN: Can I hear the question again?

(Question read.)

MR. BLUMSTEIN: Are you referring, Mr.Hruska, to variety programs or to the film series?

MR. HRUSKA: What I am referring to, your Honor, is music written for either and both variety programs and film series.

I believe the record reflects the fact that some of this music is written, in effect, before the season, theme music, and as the season has been going the composers are retained for particular programs, are also called upon to write music within short periods of time on cue

to fit certain moods, dramatic events that are to be shown on the program.

THE COURT: I understand. I don't know whether you feel that is not a fair characterization of the evidence. I can't recall the details of it. Let's proceed on the assumption that it is a reasonable characterization and subject to connection. The first question is whether Mr. Nathan has read the testimony relating to all that.

MR. HRUSKA: Right.

A I did not personally. My senior associate did. We discussed it. I don't recall the detailsof it.

Q So you don't personally know the degree to which the skills required to write music for television programs are highly special skills?

A Well, I did get that feeling out of Mr. Dann's and Mr. Shulman's testimony, certainly the number of such writers are not unlimited. These producers have a pretty good idea who the people are and what they can do and how they can hire and things of that nature.

Q Do you know how limited that number is?

A I read somewhere where it may be a couple of hundred really able people.

Q Where did you read that, sir?

A I think that was in Mr. Dann's testimony. That is a recollection I have. My memory could be wrong.

Q I believe it is, but the record will show which of us is correct on that.

A Sure.

THE COURT: I didn't understand from what you just said whether you disagreed.

MR. HRUSKA: Yes, I disagree. I think the number is probably on the down side of 40 rather than anywhere close to 100. I am quite sure that the record does not indicate a number as large as 100.

MR. TOPKIS: Is it being suggested to the witness now that there are only 40 people --

THE COURT: No.

MR. HRUSKA: No, I am simply answering his Honor's question.

Q Have you made any study regarding the extent of the competition among producers of network television programs for the services of such composers?

A No, I have not made a study of that.

Q Are you aware of the range of payments made to such composers over and above their ASCAP or BMI distributions?

A I have again in testimony seen figures ranging from $1500 to $4000, as I recall some figures for background and theme music. I have made no study. I can't tell you the distribution or the concentration or the average or the method.

Q Do you recall the testimony of Mr. Green that the amount that he received in ASCAP distributions was even larger, and I think he said considerably larger than the amounts he received from the producer?

A Yes, I recall that.

Q Do payments of that magnitude of these composers indicate to you that the bargaining power of television producers is higher than that of the composers of original music for television?

A Well, youmean just on those figures?

Q Yes.

A No, I don't think they indicate to me one way or the other where the bargaining strength lies.

Q They don't indicate to you, do they, that the composers of such music are at the mercy of the television producers?

A No, I don't think those figures indicate that either one is at the mercy of the other.

Q It looks like a pretty even match to you?

A I am sure these figures are arrived at through bargaining and that one person writes the background or theme music for a production and he gets $2250, at that price there has been a match. Through bargaining they have arrived at it, the one having the money and the other having the talent, and this has been a bargained level.

THE COURT: I suppose there would be a price level at which you might conclude that the composer was at the mercy of the producer if he got five dollars for writing --

THE WITNESS: Yes.

THE COURT: Or if he got $500,000 you would think it was the other way around, is that right?

THE WITNESS: Yes, I think that is quite right. I saw nothing in the testimony that I read that would indicate that the writers have a feeling that they are being reduced to nil reward for their talents nor, on the other hand, any evidence as I read it that the producers were being held up in any degree by this writing cost.

Q Let's suppose that ASCAP and BMI were enjoined from licensing television networks. Do you think under those circumstances the producers of television programs would have any more bargaining power than they now possess in their dealings with composers of original television

music?

A The bargaining would be pretty much the same, but if my assumption, Mr. Hruska, is correct, that the budget of the producers or packagers, including the performance rights costs were less than it now is, they would, in a sense, have more bargaining power because the writer or the publisher would know that there are less funds available and that he stays with what he regards as a price derived from arms' length bargaining, what he thinks his music is worth is not going to result in a contract, then he is at a disadvantage. In other words, if I am bargaining with you on a certain product or a certain performance and we are able to arrive at a level of writing price because you know and I know that there is this source of revenue out here in the blue from ASCAP for our performance rights, I don't mean that that writing negotiation is insignificant, but it doesn't take on the critical nature that would result if you and I were bargaining and I knew that that was gone and I had to now bargain with you, and I also knew that you had less money than was available before for that combination of purposes. I think your advantage would be enhanced relative to mine as the publisher.

Q If what you just said is true, Mr. Nathan, why doesn't the CBS television Network reduce the budgets of the producers of these programs now to engage such bargaining strength?

A I'm afraid I didn't make myself clear. I said that the--well, let me put it another way.

In my judgment the network is today providing a budget for the producer which they regard as the minimum needed by the producer to get the writing done.

Q To get the writing done at what level, what quality level?

A Well, undoubtedly that's a bargaining now between the producer and the television network, and the televsion network says to the producer: Now, you give me a good show, but here is the money, and the budget is as low as they can bargain between them.

That's bargaining, too.

Q Do you think the television network has an interest in the quality of that program?

A Oh, they certainly do have an interest in the quality of the program.

Q Do you think that they will run any substantial risk in impairing the quality of that program and, therefore, the ratings of that program for the sake of saving, let's

say, a few hundred or even a few thousand dollars on the music written for that program?

A Well, there are two observations I would make on that point, Mr. Hruska.

One, that there has been a reduction in the use of music. Whether that is attributable to this sort of weighted voting that we talked about before or whether it is attributable to the decision of the networks, it is hard to tell. I happen to be a little bit familiar with the record on the ecess--the prime time excess rule with the increased program control by the networks, the three networks, and there is a real limit of strength there--

MR. HRUSKA: I move to strike this, your Honor. I think it is off the question and I think it is inadmissible. If we start going into alleged control, I think we have got a big evidentiary question to resolve.

THE COURT: Will you read me back the question.

(Question read.)

THE COURT: I will sustain your motion to strike on the grounds that Mr. Nathan's very interesting discourse didn't seem to me to be answering the question.

Would you direct your attention specifically to the question, Mr. Nathan.

A The question as I understood it, with the re-

reading, is whether the network would risk the rating for the saving of a few hundred or a few thousand dollars. I'm sure that the network from an economic point of view would seek to maintain the highest possible rating, but it is equally true that on the other side of the coin it is seeking to save the maximum it can, and also one has to judge ratings in relation to the competition among programs.

THE COURT: I take it also that it is a possibility of your believing that you could have, let's say, a less expensive song without risking the quality of the program?

Mr. Hruska assumes reasonably in his own question there's a risk involved. There must also be situations which there would probably not be any serious risk.

THE WITNESS: Your Honor, the basic implication of this reduction of the cost in performance rights has implicit a question for the networks with respect to the quantity of music used as well as to the selection of music in relation to its cost.

If you are going to try and save money on music, which appears to be the objective clearly here--to me it appears clear--then you are going to have a reduction in quantity of music involved or you are going to have to lower your price, which I would think would have a marginal impact on quality.

Q Mr. Nathan, if writers of music written for television programs would in a direct licensing work for less money than the current payment is they receive from producers and their ASCAP performance credits, why don't they do so now?

A Well, first of all, there is a--there is an overall negotiation. The ASCAP and the BMI negotiations with the network have the optimization of the income of the membership. They are going to bargain as effectively as they can to get the optimum maximum level of income that they can through the negotiation with their members.

I'm not certain that the individuals would work for less if there were real bargaining.

One of the major concerns I have in trying to envisage this direct licensing has to do with the relative strength on the two sides of the bargaining table, with CTN on one side and the individual publishers and writers on the other.

Q You think now then that the prices being paid to these writers, both directly by the producer and through the ASCAP distribution system, are higher than the competitive equilibrium price?

A Not necessarily. I'm not at all certain that they are because we really don't have a basis, Mr. Hruska, to judge what would happen. I'm concerned about the bargaining

strengths, but it is entirely possible that a direct licensing may result in larger revenue to writers and publishers from CTN. That's entirely possible, Mr. Hruska.

As I boserve and try to understand the bargaining process in this new and as yet undefined and difficult to articulate and lay out in full detail system, I worry about the bargaining strengths. It may be a higher price.

Q We are dealing now with your testimony, Mr. Nathan, in which you said if CTN reduced the budgets to program packagers, there would be a squeeze and program packagers could squeeze the writers of this kind of music down in price.

A That's correct.

Q All right.

I ask you why aren't they doing it now?

THE COURT: Why isn't who doing it now?

Q Why isn't, on the one hand CTN reducing the budgets for these programs, and on the other hand, the program packagers reducing the amount that they are paying these composers.

A The mechanism for the squeeze does not prevail today. What you have is the next work. Columbia Television Network pays for its music in two ways. One is the writing.

I don't know whether Johnny Green's experience

is typical as everyone else, that his royalty payments from ASCAP are muchhigher than the writing payments.

Q Assume they are not?

A I don't know. I don't know what the relationship is. Here now you have two bargaining mechanisms, one bargaining mechanism is Columbia Television Network bargaining with the other--through the producer or with the producer to the writer for part of his income, namely, the product; the other side of the coin is Columbia Television Network bargaining with ASCAP under this blanket license.

The whole system is different. Here you have a blanket. Here you have deficiencies as I mentioned on the one side; on the other side, the producer has a choice of any music he wants to use.

So that you don't have anything that would shed light on what you have just asked me, namely, why today doesn't the television network reduce the price to the writer as would happen under a direct licensing which, as is contended and correctly so, would be a straight competition between the producer and the network on the one hand and the writer and the publisher piece by piece.

Q Mr. Nathan, you said the writer gets paid in two parts.

A Yes.

Q A, as ASCAP distributions?

A Yes, sir.

Q B, directly from the producer?

A Yes, sir.

Q In terms of a weekly salary?

A Yes, sir.

Q Now, let us assume the sum of A and B is C.

A Yes, sir.

Q The price paid to the composer then is C in today's world.

A That's correct.

The income to the composer is C.

Q Right.

A Yes, sir.

Q Now, you say in a world without ASCAP--

A Or direct license.

Q Or a world of direct licensing, that the producer and the television network will have the ability to reduce that price below C, right?

A He will be in a better position to reduce that price below C, yes, sir.

Q Because he will be reducing the B portion of this formula?

A Well, he is going to--he is going to--

THE COURT: Less total, I assume, than A and B combined?

A Yes.

Q My question is why doesn't he now reduce the B portion of the formula to pay less total if he has that ability and doesn't the fact that he does not do that indicate to you that he has no such ability?

MR. BLUMSTEIN: What is the B portion?

MR. HRUSKA: The direct payments to the writer.

THE COURT: I believe that you have asked the question already and Mr. Nathan has given you his answer.

As I understand his answer, and I don't know that I need to explain it but it is that today a composer, backed up by the fact that he does have this other source of revenue, is in a stronger position, in effect, to hold a network to the line that it is now on than he would have if those ASCAP payments were not there and he is not necessarily explaining why a network hasn't tried to do something but what comes across to me is that the climate isn't favorable for that attempt in your opinion, isn't that right?

A Well, apparently the network hasn't found it favorable and the network isn't willing to pursue the hiring of the performance rights.

Q Why would they pursue it in a world in which ASCAP had ceased licensing television networks and normal

licensing was done on a direct basis?

A I sincerely believe that Columbia Television Network believes--I believe that they believe--that under a direct licensing, their bargaining capability with respect to both the writing income of the composer and the performance rights will put them into a better position to bargain down that cost than they have today.

I don't think they would--they wouldn't pursue this case if they didn't believe that.

Q Let me ask you about that--have no other explanations occurred to you for the institution of this lawsuit?

A Well, I've read--

Q Other than the desire to drive music prices below the level existing as of this moment in time?

A Well, I listened to Mr. Sipes. He talked about the principal of not paying for that which is not being used, the principle of bargaining directly, the principle of not being required to deal with this intermediary and I don't know many businessmen, and I've dealt with a lot of them and worked for a lot of them, who when the chips are down wouldn't seek to reduce their income by negotiations and the heck with principle.

Q Did it ever occur to you that there might have been a business judgment that in the absence of the insti-

tution of a competitive system, music performance rights in the future might escalate to levels that were far and above the levels, even increasing levels, to which they might rise in a competitive system?

A Yes, that a --

THE COURT: You mean it is the obverse of what you said?

I said the obverse of what you said, but it would fall within the rationale of what you said.

THE WITNESS: That's right. It would fall in the same rationale. It is primarily an economic decision.

Q But it is different from reducing current level of payments?

A Reducing from what they otherwise would be, then.

Q Is this another proposition, Mr. Nathan, on which we can agree:

Do you agree that direct licensing on the scale required by a television network, if it is to fulfill its requirements by this mean s, cannot work without the creation of direct licensing machinery of some sort?

THE COURT: You mean some kind of institutionalisation of the process.

MR. HRUSKA: Yes, your Honor. The only reason I hesitated on the word "institutional," I mean that in a very broad sense.

THE COURT: Some regular method.

MR. HRUSKA: That's right. Some regularization

of the process -- let me stop there, yes.

A I think some regular process, procedures, channels, perhaps even an instrument that -- organizational instrument that would make it efficient would be necessary.

Q Some market facilities?

A Yes. I don't think they need to be tremendously complex, but I think it would be very, very important, very important to this fulfillment.

Q And you are aware of the fact that direct licensing machinery facilities exist for movie rights transactions?

A Yes, I understand they do.

Q And are you aware of the fact that those facilities were created because there was a need for those facilities?

A Well, I know that the -- that the ASCAP does not license music performance rights for movies so there is some kind of a need there for some facility.

I am not familiar with those facilities, by the way.

THE COURT: Even without familiarity, I assume you would be prepared to believe that they exist because they are needed?

THE WITNESS: Oh, yes, because they are needed,

I would assume.

They would not exist otherwise.

Q I thought we could agree on some of these subjects. You don't know the number of transactions made in the course of a given year in movie rights, do you?

A No, I do not.

Q Are you aware of the fact that there exists direct licensing machinery for television synchronization rights deals?

A Yes, I am aware of that.

Q And are you aware of the fact that direct licensing machinery exists for mechanical rights transactions?

A Yes.

Q Do you also agree that the requisite direct licensing machine could not be established without the cooperation of the publishers and the writers?

A Well, I am not sure what you mean by cooperation. By the acquiescence or participation. If you had a machinery and they just would refuse to ever talk, which I can't conceive, of passing up business this way, but I think that a machinery in what we are talking about here in a sense is a connecting rod, a mechanism to bring together the buyer and the seller and since the publisher and the writer is the seller, this machinery has to involve both sides.

Q Are you familiar with the sort of machinery that CBS had proposed developing in either the event of an injunction against ASCAP and BMI licensing television networks or in the event of the institution of a per use system?

A That CBS had proposed?

Q Right. I believe Mr. Sypes gave some --

THE COURT: There was testimony in this case about the computer.

A Oh, yes. I remember, now. Where they would invite people to write in and tell where they are and what the title of the music is and where they can be reached and to build up a catalog or a repertoiry in that way and that they had called in computer companies with software

capability to do the programming, yes, I am familiar with that.

Q And do you recall that one of the features of that plan was that the writers and publishers, copyright owners, would designate in some written form so that it could be fed into a computer the name, address and telephone number of a man, whether an employee of the publishing company or an independent agent, who was set up and prepared to deal on a direct basis for performance rights?

A Yes, I recall that.

Q Do you recall that it was a feature of this plan that as changes were made, additions or deletions, in a publisher's catalog that information concerning those changes would be fed into this computer system by means of publisher notification of CBS?

A Yes, sir.

Q Do you think that that sort of system could be created without the cooperation of the copyright proprietor?

A I think the copyright proprietors would have to cooperate and I think they would cooperate. They would want to participate in business to sell their music and get performance rights.

Q You had testified yesterday that you thought a bypass by CTN of ASCAP and BMI could work if CTN

made it absolutely clear and unequivocal that it was going this route and not going back to ASCAP.

Do you remember that?

A Yes, I remember that.

Q Suppose despite what CBS said on the subject the situation was not clear and there was great skepticism in the music publishing industry regarding whether CBS could hold out without having to go back to ASCAP.

The question I would put is simply whether that state of the affairs would affect your judgment as to whether ot not CTI could bypass without competitive injury?

MR. BLUMSTEIN: I just don't see how anybody could possibly answer that question. It is speculative. You don't know what kind of notice, what kind of skepticism.

THE COURT: I think Mr. Nathan is capable of qualifying whether the answer he gives is not much more speculative than the speculation that the plan would succeed if they stood firm but he can make whatever qualifications he wants in an answer.

THE WITNESS: All I can say on this, your Honor, is that despite problems these days, I still believe that credibility is an important asset and I have no reason to believe that if a company, and I don't say this lightly and I mean this, as prestigious and able and powerful as

Columbia Television Network made the statement that it was clearly going out of the ASCAP licensing and welcomed offers, it was looking for music, it was going to deal fairly and at arms' length and such, appropriate pricing policies, I find it hard to believe that nobody would believe them.

Now, obviously, if nobody believes them, they have trouble but as an economist, we deal all the time in securities and floatations and credit and sales and advertising and everything else where most people that say things believe what they say and most people believe them and I think that Columbia Television Network would be believed.

Now, if there were reason to doubt it, then they would be in trouble.

THE COURT: Gentlemen, I regret having to stop because it is very interesting, but I do have to stop.

May I ask what arrangements have been made for the completion of Mr. Nathan's testimony? He has to come back. Are we going to be able to finish it tomorrow?

MR. TOPKIS: Our plan was that he would come back next week.

THECCOURT: That is what I thought, but I thought we ought to get it settled before Mr. Nathan

leaves.

I will leave it to you gentlemen to work it out, then.

And he will not appear tomorrow?

MR. HRUSKA: No. I would like to continue the cross-examination tomorrow.

MR. TOPKIS: He will be back tomorrow.

THE COURT: All right.

(Adjourned to Thursday, December 6, 1973, at 10:00 A.M.)

December 5, 1973

3920	15	cBS	CBS
3920	16	elements of a e	Elements of a
3920	17	per use license	Per Use License
3921	5	Music Broadcast	music broadcast
3921	10	used	use
3921	16	betweenCBS	between CBS
3924	2	inmmy	in my
3924	9	Now,	Q Now,
3925	12	word is subjective	wasn't its objective
3926	14	its	it's

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PAGE	LINE	ERROR	CHANGE TO
3926	14	packers for	packagers for the
3926	15	would, say	would say
3926	21	processer	producer
3928	13	reserve	preserve
3929	18	which obviously the	which, obviously, the
3929	21	say	see
3932	20	not	no
3932	25	Turned	Turning
3933	19	Television,	Television is
3934	17	work	works
3935	4	any sum or	any, some, or
3935	9	ona	on a
3935	13	writer saying	writer is saying
3935	20	say.	se.
3936	20	would no,	would, no,
3937	9	difficultyit	difficulty it
3938	10	herein,	here, in
3938	10	negotiation	negotiation.
3938	15	Network, strong	Network, a strong
3938	16	organizations	organization
3938	16	systemwhich	system which
3938	17	cost	costing
3939	18	than it	than what it

4C81- 3

PAGE	LINE	ERROR	CHANGE TO
3942	12	althogh	although
3943	21	Televisio	Television
3945	3	-- however,	-- "However, (?)
3945	19	paying o	payout out
3945	25	tured	ture
3949	3	Fischer	Fisher
3950	2	Fischer	Fisher
3950	9	Fischer	Fisher
3951	7	internal	interim
3952	24	star;	star,
3954	22	Fische	Fisher
3957	6	here, theme	here as in theme
3957	25	awards	rewards
3958	6	ess than	less than --
3958	14	overtime for	over time, for
3959	5	likely	likely,
3961	5	hBC	NBC
3961	22	withthe	with the
3961	25	us	is
3962	7	to do	to not do
3962	11	choic	choice
3962	11	freedome	freedom
3964	17	economic	economic,

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PAGE	LINE	ERROR	CHANGE TO
3964	22	the competitors competing	competitors from establishing competing
3965	9	investme nt	investment
3965	13	nothing	anything
3966	6	of, namely	of ASCAP have, namely
3966	13	of	have
3969	10	with, first,	with first
3969	11	principals	principles
3969	18	principal	principle
3970	5	Fischer	Fisher
3971	8	butin	but in
3971	21	with	where
3971	24	if	in
3974	20	prose	proceeds
3975	3	son	song
3975	14	decending	descending
3975	25	network	networks
3976	3	seeno	see no
3978	23	production	reproduction
3979	6	arbitrary	arbitration
3980	19	your	you
3982	13	costume	product
3984	7	private	price
3986	6	inthat	in that

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PAGE	LINE	ERROR	CHANGE TO
3987	25	for	or
3988	20	Ibelieve	I believe
3990	8	bargan	bargain
3991	21	tal-ing	talking
3994	3	YOu	You
3994	12	did	did not
3995	6	registered	registered
3996	6	removed record	removed, record
3996	22	man	mean
3996	22	talent and	talent, and
3996	23	opposit,	opposite,
3997	4	outselves	ourselves
3997	11	differeing	differing
4003	12	likeyou	like you
4005	7	mechanical	mechanically
4005	12	consummer	consumer
4008	3	worst	worse
4008	10	allocator	allocation
4010	12	son	song
4010	22	I can	I
4010	22	of some	in sum
4011	6	Yes,sir	Yes, sir
4011	16	Got	got

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PAGE	LINE	ERROR	CHANGE TO
4011	25	out--	outside
4013	10	Petruska	Petrushka
4014	4	M R.	MR.
4015	3	ofthose	of those
4016	3	e conomic	economic
4016	14	is an	is
4016	15	1500	$1500
4018	12	publisher	publishers.
4018	12	exclusive	exclusively
4020	10	in very	in a very
4020	11	concerning	concerns
4020	20	there of	thereof
4021	6	economic	economics,
4021	14	and one	and to one
4021	14	food is	food it is
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

4081- 13

COLUMBIA BROADCASTING SYSTEM	Before: HON. MORRIS E. LASKER, District Judge.
vs.	
AMERICAN SOCIETY OF COMPOSERS, AUTHORS and PUBLISHERS	69 Civil 5740

New York, December 6, 1973

STENOGRAPHER'S MINUTES

COLUMBIA BROADCASTING SYSTEM

vs. 69 Civil 5740

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.

December 6, 1973
10 a.m.

(Trial resumed.)

ROBERT R. NATHAN, resumed.

CONTINUED CROSS EXAMINATION

BY MR. HRUSKA:

Q Good morning, Mr. Nathan.

A Good morning, sir.

Q On direct examination when you were discussing the potential attitudes of ASCAP members toward the possibility of direct licensing the CBS Television Network in the event of a by-pass, you covered, I think, both sides of the fence.

You discussed, I believe, attitudes which you thought would be favorable toward direct licensing and you discussed some other attitudes.

You said that CTN's doors wouldn't be broken down, that some writers and publishers would be hesitant, some would be better; those with long association with ASCAP would not be happy, some writers and publishers would say, let CTN suffer and come back to the fold and you also

said that writers and publishers, without question, prefer to deal through ASCAP.

As a result of that attitude on the part of some writers and publishers, would you expect that there would be some immediate impact on producers' abilities to license the music that they wanted to use in the very first instance?

A Well, if you mean by immediate impact that they would not have spontaneous and total access to the ASCAP repertoire through direct licensing, I think there would not be total and spontaneous access.

To the extent that some individuals did hesitate and some individuals did object to the change in the process. To that extent they would not have total access immediately.

Q And that would mean that to some extent the producers would not have access to the music that they wanted to use on the programs coming up in this immediate period--that is, the period immediately after the by-pass had commenced?

A Yes. I think if we are talking about a very, very short, spontaneous immediate period, to the extent, and I think some would be hesitant, to that extent those who were hesitant to deal in direct licensing, their product would not be available the next day or spontaneously, that's correct.

Q Have you considered the extent to which that sort of impact would show up in the ratings of television network programs, or is this a field you are not familiar with?

A I am not familiar specifically with what precise factors effect ratings and to what extent they do but I would take the sweep of the access to these hundreds of thousands of tunes or compositions and background music that would be available and I find it hard to see, in economic terms, a shift in the demand-supply or bargaining relationships here which would be sufficient in terms of changes in the music content of ASCAP programs as to adversely effect its ratings.

Q Did you read the testimony of Mr. Segelstein? I forget whether you told us that?

A I said no, not personally, I did not.

Q And I take it you have never made any study of the degree to which slight changes, slight inhibitions on program producer and director flexibility could effect adversely program quality and lead to an adverse effect on program ratings?

A I did not make a study whether they would or would not effect the ratings.

Q You testified, in discussing the 3M incident, that 3M--I think I have this right--waited longer than it

might have turned to mid.

Q. You would that?

A. [illegible] I remember reading testimony about the [illegible] and there were some statements that 3M was not in a hurry [illegible], somebody said, well, they could have [illegible] they could have concluded their arrangements faster.

Q. How long do you think, in the event of a by-pass, how long do you [illegible] the CBS Television Network can [illegible] disadvantage until the producers could [illegible] they wanted to use?

A. Well, I think for this purpose, Mr. Mruska, one has to break down this situation between the theme and background music on the one hand and the feature music on the other.

The theme and background would in my judgment be available very rapidly in view of the, as I have spelled it out, the producer-packager relationship with the writer and having that relationship, it is my judgment that there would be very little hesitation or disinclination as has been used here and that the producers who are working with Columbia Television Network would be able to get the theme and background without any significant delay.

Now, as far as the other side is concerned, as I

have said, I think in all realistic terms there will be some hesitance and some will not go immediately, but in economic terms I am, myself, convinced that there would be a sizeable number who would move to take advantage of the opportunities offered by Columbia Television Network and would go with those producers, getting in earlier; they would have the advantage, they would get a lot of their music used, and therefore, while the network would have to make some choice between songs, I would say given the range of music available that the disadvantages associated with any delay would be exceedingly minimal in the sense that they would have such a wide variety in my judgment to select from quite quickly that I find it hard to see an economic disadvantage associated or derived or flowing to, disadvantage flowing to CTN that would be significant in its impact on the ratings.

THE COURT: Mr. Nathan, the distinction which you make between feature music and theme and background, and which we all make here, I guess, is that feature music has to be a particular thing; you can't go out and hire somebody to write a song that's already been written.

THE WITNESS: That's correct.

THE COURT: And this raises a whole question of the economic value, if you can translate it into terms of economic value, in music of uniqueness and specialness and so

on.

Have you given any thought to the extent to which you believe that even feature pieces have a certain degree of fungibility?

Have you any opinion on that?

THE WITNESS: Yes, I do, your Honor. I have read, as I say--

THE COURT: I am not expressing a view bu asking the question.

THE WITNESS: Yes, your Honor. I don't regard myself as an expert personally inthe field --

THE COURT: I don't know that anybody can be "the" expert on the subject.

THE WITNESS: But I have read statements by men like Mr. Dann or Mr. Shulman or Mr. Chiantia and the reference is very direct sometimes and sometimes a little subtle or oblique, there are occasion that in the feature writing there is considerable amount of substitutability.

As a matter of fact, one bit of testimony that I read -- I guess it may have been Mr. Dann -- went so far as to say that it is seldom that even a unique piece sought by a prominent star can usually be substituted for by another piece and the distinction that I draw --

THE COURT: I heard Mr. Dann say it, so by telling me that he said it, I haven't learned more, of course.

How does that accord with your own experience as an economist?

THE WITNESS: Well, as an economist we find, I think in most economic activities and decisions, that no buyer likes to subject himself to a unique source and,

therefore, does seek substitutions and does seek alternate sources, especially when you have a buyer of a component who is a strong force in the determination of the market.

That buyer is more able to work with substitutes than another.

So that in my judgment, to the extent that there is a degree of fungibility with the feature music and the experts have strongly indicated this, to that extent the CTN and its producers would, I am confident, as economic people, pursue alternatives to the extent that it is not available.

My contrast in answering Mr. Hruska was not just the fact that theme and background music is more fungible or features are less fungible. The problem is also, sir, one of the paths, the channels. With theme and background, there is that contact and with the feature, there is outside negotiations.

THE COURT: I understand. Right.

Q You haven't read the testimony of Ned Washington?

A No, I have not.

Q Did you read the testimony of Buddy Morris?

A I did not myself, sir. My associate did, but I did not read it.

Q Did your associate report to you anything that

MR. Morris said on the subject of the fungibility or non-fungibility of published music used in a feature capacity on television network programs?

A I don't recall it, sir.

Q Did you read the testimony of Mr. Vogel on the subject?

A I did not.

Q Did you read the testimony of Mr. Brettler on the subject?

A I did not.

Q And I believe you told us yesterday, and correct me if I am wrong, that you did not read the testimony of Messrs.Wright, Sunga and Vincent?

A That 's cirrect.

Q Did I correctly understand you just now to say, in words or substance, that there was something about the position of the CBS Television Network which made it or which enabled it to do without songs that had some distinctive characteristics -- White Christmas, Happy Birthday, Chinatown My Chinatown, a production number in Chinatown, using an example that came out of one of the depositions?

A Yes. I did say that I thought the Columbia Television Network was in a better position than would be the situation if there were a vast number of networks and

intensive competition among the networks among a vast number of networks and the specific items ofmusic became of great importance.

Now, White Christmas is a very unique song and I find it hard, personally, to think of a Bing Crosby program at Christmastime without White Christmas, but I am sure that the producer even there or the Columbia Broadcasting System or any network would, at a given price, say, well, we will not let Mr. Crosby do something related to White Christmas, but not quite.

But I think that given the fact that we do have three networks and that Columbia is a very, very important and strong network with important program influence, that its capacity to undertake substitutability or use fungible music is greater than a less powerful force would.

You see, the problem with all these factors, there are so many elements of degree. I think one can't say, this music is fungible and this is not. This has a substitute and this has not. A substitute with how much satisfaction and how much dissatisfaction.

THE COURT: We are really talking about whether the viewer is going to walk away or not, isn't that it?

THE WITNESS: Yes. Even whether the user is

so unhappy he will turn it off.

Q Or whether he will perceive a diminution of what the viewer normally expects in a prime time television network program?

A Yes. I don't know how to measure it. If I saw the Christmas special with Bing Crosby and he didn't sing White Christmas, I don't know that I would turn it off and turn on a game show but I might wonder in my mind about it, and I suppose if I felt as strongly about that program as I do about some economic matters, I might even sit down and write a letter to Frank Stanton.

THE COURT: By that time you probably had read in the paper that CTN wasn't going to do business with ASCAP.

Q Do you know if the game shows are matched in the television network schedule against the musical variety program?

A No. They usually get off before then.

Q You had mentioned the fact, Mr. Nathan, that there were only two musical variety programs on CBS these days in prime time.

Would your view of this matter be altered in any way if, let's say, there were six, seven, six or seven musical variety programs slotted in the prime time hours?

A Well, I would certainly recognize that the problem, the magnitude of the problem and the manageableness of the direct licensing would be more difficult, obviously. It is my strong impression as an economist -- I am trying to think of economic relationships and negotiations and alike, that the type and background which is predominant today is much more manageable than the feature.

Obviously it is perfectly logical that if you had a much larger number of variety shows with many more features, it would be more difficult to organize.

Q Have you conducted any study to determine the shifts from year to year and the types of programs presented on network television?

A I have not conducted such a study.

Q Are you aware of the fact that such shifts are traditional in the industry?

A Yes. Out of my own knowledge, I have seen them go up and down. While it has no -- it doesn't seem to

me as I have observed it the kind of rhythmic periodicity that one sees in the business, you have had to see in the business cycle, to a lesser extent recently.

Out of my own recollection, I have seen types of music increase and decrease, types of programs.

Q You are generally aware as really a member of the public, aren't you, like any other form of entertainment, the public gets tired of one form and then demands something new and the suppliers of that entertainment respond to that public demand?

MR. BLUMSTEIN: I don't know where this is getting us.

THE COURT: Where it is getting us is the opportunity of Mr. Hruska to argue there may be a time there will be six variety shows. Whether Mr. Nathan is aware of it or the public, I am also aware of it. I am glad to hear that the networks are aware of the fact that the public sometimes get tired of shows.

MR. TOPKIS: You heard Mr. Hruska say that.

Q Are you aware of the number of westerns and network television in 1965 in comparison to the number that are now on television?

THE COURT: I don't think we need to go through this in detail. If you want to ask Mr. Nathan if he made

any study of the shifts of the kinds of shows --

MR. HRUSKA: He has said hehas not. Perhaps I will drop that, right, your Honor.

Q Are you aware of the number of variety programs on CTN during the 1969, 1970 season?

A I read that figure somewhere, Mr. Hruska in somebody's testimony. I don't recall it. I would accept a figure that was given. My recollection is it was larger than the present number.

Q Do you know how many prime time musical variety programs appeared on the three national commercial television networks in 1969, '70 season?

A Again, I don't recall the figure.

Q Do you know how many specials appeared on CTN last year which used substantial quantities of music?

A I don't remember the number. Like the Frank Sinatra Show or Sammy Davis recently. I don't remember.

Q Or the number of specials that were straight musical variety programs?

A No, I don't remember.

Q Do you know the average number of songs used each week by a variety program, feature songs, published songs?

A I wouldn't know.

I remember looking at your survey for the first quarter of '72 and there was one -- I was amazed at how many songs or pieces of songs were used. The number eight or ten somehow sticks in my mind, but I don't want to say that is a figure that I know to be a fact.

I am sure a sizeable number of songs are used in a variety show.

Q Mr. Nathan, are you operating on the assumption that all background music is written for the program?

A Not all, no; a very substantial portion.

Q Do you know how many, approximately, pieces of previously published music are used each week as background music on CBS Television Network programs?

A No, I don't know that.

Q You talked about composers of original music for television, music written for television programs.

Are you aware of any unifying force in the market composed of such composers?

THE COURT: I didn't understand the question. Would you read it, please.

MR. HRUSKA: I can restate it very quickly, your Honor.

Q The question was: Are you aware of any unifying

force present in the market composed of writers of music written especially for television.

MR. BLUMSTEIN: The words "unifying force" make it very difficult to answer that question. Hunger might be a unifying force.

MR. BRUSH: Institutional unifying force.

THE COURT: Institutional unifying force. If you don't understand the question you are free to say so. If you do understand the question, would you explain what unifying force is that you refer to.

THE WITNESS: Are you referring to CLGA?

Q I might be, yes.

A That is one which is a union certified, and I gather it is not actively bargaining, but that was a force of composers and lyricists, as I understand it, who got together for strengthening of their bargaining capabilities.

Q Mr. Nathan, is it your view that CTN would suffer less competitive disadvantage through the inability to use special published musical compositions in a feature capacity as a result of the fact that there are only three television networks? In other words, it would suffer more if there were many television networks, say 10 or 15?

A Suffer more under what circumstances? You

means always, ongoing or the change to direct licensing or what?

Q Let's assume that the inability of the producers of television programs to obtain the published music that they want to use on their programs in a feature capacity would be a competitive disadvantage.

My question is: Would that competitive disadvantage be less or greater if there were 15 television networks rather than 3?

MR. BLUMSTEIN: I wonder what the relevance of that question is?

MR. HRUSKA: The relevance, your Honor, is Mr. Nathan's prior statement that he thought the inability to use such music would be manageable in view of the fact that there wereonly three television networks.

THE COURT: Mr. Nathan did talkabout the number of networks being relevant to his opinion. I think Mr. Hruska is entitled to clarify that.

THE WITNESS: Can I ask one other question about the assumption now?

Q Yes.

A Is this an assumption that only CTN would be disadvantaged relative to what it was before?

Q Yes, because I am assuming in this question, and I should have made it clear, that only CTN has no ASCAP license and that the other television networks do have ASCAP licenses.

As the result of that, the producers of programs destined for CTN cannot get an appreciable part of the feature music that they want to use and that that is a competitive disadvantage.

The question is: Is that advantage higher or lower depending on the number of television networks competing with CTN?

A Well, I think the -- if I may put it in a disadvantage way.

Q Yes.

A The disadvantage to CTN to the extent there is any would in my judgment be greater if there were a lot more networks with -- with less networks CTN is in a better bargaining position to expedite the change that is implicit here.

Q That is it. I have assumed that way. I have asked you to assume the fact of competitivity disadvantage. I simply want to know whether that competitive disadvantage will be higher orlower depending on the number of television networks.

A I think it would be higher -- well, it would be lower with a larger number -- higher with a larger number of networks.

THE COURT: If I understand your testimony, what you say is when there is limited number, three networks, one of the three, particularly one which seems at least in the record to be perhaps the largest user of music, would be in a position to limit the damage to itself more effectively than if there were 15 other people competing in the market for music with it?

THE WITNESS: That's correct, your Honor.

Q How?

A Well, if there were 15 in the market--assuming there are some disadvantage which is the assumption, the whole effort on the part of the Columbia Television Network is encouraging opportunities on the part of these writers and composers and publishers to have music outlets that are vastly larger than they have today.

I postulated a premise even Columbia wasn't bigger than the other two. We know it is much bigger than ABC in terms of program use.

But let's assume it was equal, three. If there were this advantage, which I assume--if there were this disadvantage, the question is how great is it when there are literally only two other outlets that the individuals can see their programs being used upon. This I think limits in some degree that disadvantage which we are assuming.

Now, if they have 14 more outlets in which they can proceed, the prospects are economically that those who are implying to be disinclined or to hesitate or not come out from under ASCAP in dealing with Columbia would be even more hesitant to do so knowing these 14 channels where the music might be used.

Q We agreed yesterday, Mr. Nathan, that a use on a musical variety program of a published piece of music is

likely to deter for some period of time use on another television network.

A Yes, sir.

Q Now, in the circumstances which there were 15 television networks and the producer of the CTN program approached, let's say, Mr. Chiantia for a license to use the song on a CTN program, isn't it reasonable to assume that Mr. Chiantia could say to himself, if I license CTN I may lose those other 14 networks for some period of time, whereas if I don't license CTN I've got a very good chance that one of those 14 networks is going to be using my song over the next couple of months, and isn't that chance a lot greater for Mr. Chiantia in the case where there are 15 television networks than it would be in the case where there are only three?

A That's quite true, but then--you see, immediately, and this is one of the troubles I have with these assumptions--immediately I come up with the question, are you then assuming that Columbia Television Network is much like, equal to, about the same size, pays about the same price on these direct licensing and they would get to each and every one of the other 14?

If that were true, I think your observation makes a great deal of sense.

If CTN happened to have the top strength and were a major force, it would pay more and, by the way, I think with 14 the incentive that CTN could offer in terms of price to attract people on direct licensing which could be a lot less.

That's another thing. If you had 14--the price situation would change rather considerably with 14 users of music versus three.

Q Have you studied the economic effects on television network when the programs on its current schedule undergo a higher than normal rate of failure?

THE COURT: Would you repeat that, please.

(Question read.)

THE COURT: Do you understand the term higher than normal rate of failure?

THE WITNESS: Yes, I understand it.

A I have not made such a study as to what happens when a lot of the programs prove to be failures, whether it looks--whether they lose the rest of the audience. I haven't made a study of that.

Q All right.

A I beg your pardon. When they lose their audience for other programs. I didn't mean the rest of the audience. I have not made such a study.

Q All right.

Do you know the number of programs in the wings, as it were, the standby programs that are maintained on a standby basis for each program in the current schedule?

A No, I do not, sir.

Q Have you considered the potential effect on a television network in the event that the programs on the schedule undergo a more than normal rate of failure?

THE COURT: That was the question you asked a little while ago.

MR. HRUSKA: Very close. I asked him whether he had conducted a study.

A No, I had not conducted such a study.

Q Had you studied the extent to which ASCAP members would recognize that the CBS Television Network in a bypass would be at substantial risk?

MR. BLUMSTEIN: What does that mean, your Honor, substantial risk?

THE COURT: I don't know.

Would you are to define what you mean?

MR. HRUSKA: Yes, your Honor.

Would be at risk in the sense that it woudl, A, suffer a competitive disadvantage vis-a-vis other television networks which had retained their ASCAP license; B, would

place programs which cost anywhere from 100,000 to $400,000 to make in jeopardy in terms of going off the schedule because of loss of ratings and, C, placed itself at the prospect--with the prospect of undergoing unusually high research and development costs for the production of programs to fill in for programs that were failing.

MR. BLUMSTEIN: I am sorry I made the first objection.

Is the question to Mr. Nathan whether he made such a study?

THE COURT: Yes, I believe the question is, and I assume the answer will be no. We don't need to worry about objections. Am I correct?

THE WITNESS: That's correct, your Honor. The answer is no.

THE COURT: I must say, Mr. Hruska, I really don't think you needed to give us quite a detailed a definition.

MR. HRUSKA: I thought he asked.

THE COURT: Obviously your statement isn't evidence. Let's see if we can't move along.

Q Am I correct in assuming, Mr. Nathan, that you have made no study or otherwise considered the length of time to which the CBS Television Network could sustain appre-

ciable competitive disadvantage in the event of a bypass?

A I have made no studies either with respect to that assumption or the results of that assumption.

Q Let me ask you, sir, if CTN did bypass, if there was a decrease in the ratings, an adverse affect on the ratings of the CTN programs for a period of, let's say, several weeks immediately after that bypass had commenced--

THE COURT: You mean the drop would be for a period or would commence a few weeks afterwards or both?

Q It would commence right away and it would, lets say, still exist as of a period of time, which I want to focus on, namely, several weeks after the bypass had commenced, still be going on, and the NBC and ABC Television Networks announced that they were each adding three musical variety programs to prime time.

Do you believe under those circumstances that an announcement made by CTN of its intentions to bypass ASCAP would be equivocal in any way in the sense of providing some grounds for skepticism on the part of writers and publishers?

MR. BLUMSTEIN: I'm sorry, your Honor. May I please have that question read back.

THE COURT: Yes.

(Question read.)

THE COURT: It is rather long. May I be sure I understand it, and I think I do.

The question is if CTN did bypass and its ratings immediately dropped, were still dropped three weeks later, and the other networks indicated that they were going to boost up their variety shows, do you believe that CBS' prior announcement that they were going to bypass ASCAP would then be regarded with skepticism by the publishers and writers?

MR. BLUMSTEIN: I don't know how Mr. Nathan can possibly answer that question. If he has an opinion--

THE COURT: That's the question.

Do you have an opinion?

THE WITNESS: I don't believe that it would increase their skepticism as to whether CTN was carrying out its objectives, but I think it is conceivable it might delay on the part of a few there coming to CTN with direct licensing. It is entirely conceivable this could happen. I don't think a major measure. Of course, there are a lot of other assumptions. The assumption is that the main drop in the CTN rating is attributable to a decline in variety shows and the other networks, therefore, have a programmatic advantage in increasing their variety shows.

THE COURT: I was going to say this, Mr. Nathan, I am correct, am I not, that Mr. Hruska's assumption of a drop in the ratings caused by this is inconsistent with your expectations?

THE WITNESS: Yes, that's correct, and, also--

THE COURT: He is really asking you if things don't turn out the way you expect them to, then would you expect a different reaction?

THE WITNESS: Well, your Honor, I would say, I don't see any reason why people would be disinclined to believe CTN's intention but I think it is entirely possible that this might slow the coming to CTN or its producers by writers

I think it could slow down that process. Some would be a little more hesitant than they might have been otherwise.

Q Whether or not they disbelieved CTN's original intention, wouldn't there be inherent in the situation we have just been discussing, some grounds on the part of writers and publishers to believe that irrespective of the original intention, this situation could lead CTN back to ASCAP?

THE COURT: I'll sustain the objection. I think we have explored it. It is an argument you can make.

MR. HRUSKA: Of course.

Q Have you studied or otherwise considered the extent

to which ASCAP members would recognize that if a CTN bypass actually succeeded because they had assisted in creating machinery, because they were dealing directly, that other television networks would attempt such a bypass as well?

A I have not made such a study.

Q Or considered that proposition?

A Oh, I have considered that proposition, yes.

In my judgment, I think that if CTN did engage in direct licensing and did succeed and especially if it succeeded in its major objective of reducing its costs of music, I think the other two networks would be economic fools not to undertake the same process.

THE COURT: Well, I think the question goes beyond that. The question is, in reaching your conclusion that writers would go to CTN if CTN took a further position on the matter, have you considered that they might think of what we are now discussing and say, "I won't go to CTN because if CTN succeeds, then NBC and ABC will do the same thing."

A Well, those who would be inclined to go and get that money that is available would come out, and I think a large number would and others would follow. I think the same process would be pursued when and if the others came out and I think in deciding whether to go with CTN, the thought that "Well, if this succeeds, the others come out",

I don't think would deter them.

Q Have you ever made any study of the extent to which the publishers of music used on network television or concentrated?

A concentrated study.

MR. BLUMSTEIN: Your Honor, we are going to have a long list of questions about "Have you made any studies."

I think one question to Mr. Nathan on the voir dire can end it.

THE COURT: If you want to point out to me later as a result of a negative answer on Mr. Nathan's part or an answer on his part as to what studies he's made, which I gather would be quite limited, if any, then you can point out to me all the studies he hasn't made.

MR. HRUSKA: Perhaps I can do it this way, your Honor, to make it very clear on the record and Ithink it is important that this is made clear in the record because I think the testimony--

THE COURT: The limitations of any key witnesses' knowledge or study, of course, are important.

MR. HRUSKA: Perhaps I can just list several factors and I don't have too many more, and in fact, on this point, I have very few more and, just list them, to take me, I think, no more than 20 seconds and ask Mr. Nathan whether

in gross, whether he has considered or studied these propositions.

MR. BLUMSTEIN: I was going to suggest a simplier approach.

"Have you made any studies other than what you have already testified to."

THE COURT: That's sufficient for me. That protects you in the record and you can say anything you want in your brief.

Have you made any studies other than those which as far as you can recall you have discussed in your testimony that would be relevant to this case or your testimony here, Mr. Nathan?

THE WITNESS: No, I have not, sir.

Q I would like you to assume, Mr. Nathan, that there are 14 music publishing companies which now supply 45 per cent of the total use of music on CTN as measured by ASCAP credits and that those publishers also account for 60 per cent of the total ASCAP publisher credits and that approximately 40 per cent of their performance rights income is derived from use of their music on television networks.

Would those facts have any impact on the judgments you have expressed regarding the inclination or disinclination of music publishers to deal with CTN in the even of a

bypass.

MR. BLUMSTEIN: May I have the question.

Q CTN or producers of CTN programs.

(Question read.)

MR. BLUMSTEIN: I would like you to rephrase that.

MR. HRUSKA: What do you want?

MR. BLUMSTEIN: That there are 14 music publishing companies which account for 45 per cent of the credits on CTN but don't relate it to music use, please.

I don't know what you mean by music use.

MR. HRUSKA: Well, I think the--

THE COURT: Mr. Blumstein, I really don't think that the question depends on whether you know what Mr. Hruska means or not but whether it is borne out by the evidence of record.

I don't recall whether it is. Frankly, I am a little confused at the objection to this question because I think it was asked of another witness last week sometime, am I not correct? Essentially that question.

MR. HRUSKA: Yes, your Honor.

THE COURT: I don't remember how it all turned out later on but it seems to me that the question as put would be answerable--that's up to Mr. Nathan--except for the fact

that you have talked about 40 per cent of the performance rights revenue coming from TV and I would want to know at least what percentage of their total income that 40 per cent represented before I would be in a position to answer.

I don't know whether Mr. Nathan feels that way or not.

I am bypassing Mr. Blumstein's objection at the moment.

MR. BLUMSTEIN: All right.

THE COURT: Let's see what Mr. Nathan can do with what he has in his notes before him and my observation.

A Well, your Honor, I am confused between the 45 per cent and 60 per cent but I assume what Mr. Uruska is saying, given a fairly substantial portion of the total activities coming through 14 music publishers, how would I interpret, then, the problems of CTN in getting the direct licensing going.

Is that the question?

Q I'll accept that for a start.

A Well, certainly from a manageable aspect of this question of direct licensing, I think the fact that you have as few as 14 music publishers to deal with who account for somewhere near half of the other income or use or credit would give to Columbia Television Network an advantage in negotiations, in contacts, in tracing and identifying the

copyright owners from the writer point of view, if the publishers have to get their approval, and that the fact that you have this degree of concentration--it's hardly a monopoly, 14, running about half--but still it is a sizeable portion of all this vast music being used by the networks coming through 14.

So I think this would improve the manageable elements and make possible true direct licensing, or what you call the bypass, more possible than if you had much less concentration among the music publishers.

Q Let's assume, then, that this group of 14 can be split in two even halfs and we have seven publishers on one side, seven publishers on the other side and they are totally equal in terms of the statistics we discussed in the last question, and let's say in one group of 7, each publisher in that group is a publisher which is on the negative side of the direct dealing question.

These are publishers who are somewhat bitter, publishers who are hesitant, publishers who much prefer dealing through ASCAP, publishers who do not want this bypass to succeed.

Let us further assume that each of the publishers in this group of 7 not only has that attitude but knows that the other six in the group also have that attitude.

Now, is there a possibility, in your mind, that each one of those seven will wait until at least any of the other six break the ranks?

A Is this assuming that the other seven who are inclined to go on half come out and made their product available, the seven who are not.

Q Assuming anything you think reasonable about the activities of those other seven.

A Well, since, Mr. Kruska, I am not playing games, since you said you would divide the 14, seven of whom were far more resistant than the other seven, let's assume, then, that the other seven do come to CTN and their producers, packagers and say, "okay, we will work with you on direct licensing."

I think given those circumstances there is a basis, no assurance but there is a basis, for a conclusion that in those seven who are resitant no each one is and know the attitudes each of the other six have, that they would move a little more slowly than they otherwise would, saying "I am going to watch the other 6."

But once one of the other six moved, the chances are they would all tumble pretty quickly. But I think this could add a little bit of stickiness to those six, a little bit. To those seven, I mean.

THE COURT: Clearly, the more people that hold out, the stronger the holdout position is. If 13 held out of 14, certainly there would be --

A Especially, your Honor, if they sort of kn each other's views. I don't know how that happens without talking, which may have legal implications, but if they know each other's views, then I think that the larger the number -- and knowing that, a little more stickiness will be their switch.

Q Do you think that the waiting by this group of seven for some period of time could make the signal you discussed yesterday somewhat more equivocal than it otherwise would be?

MR. BLUMSTEIN: What was the question?

THE COURT: It wouldn't come through as loud and clear, I would say.

MR. HRUSKA: Thank you.

A This has to do with the signal of the -- signal to the people concerning inclination and disinclination.

Q That is the signal.

A There would be somewhat, probably, a measure of tone -- I suppose there would be a noticeable variation.

Q I want -- won't ask you how many decibals.

A I wouldn't know.

Q I would like to turn to the 3M situation, Mr. Nathan.

You said on direct examination that this was a new experimental use that 3M was going into and that for that reason there was considerable risk. I was a little confused by that.

Could you tell me to whomdid you envisage that risk?

MR. BLUMSTEIN: Have you got a page reference, Mr. Hruska, for that?

MR. HRUSKA: Page 3911, top of the page: "Here you have a new entity where the risk element is very considerable.'

Q And the question is, to whom was that risk posted?

A Well, in the first place, obviously, the risk would be to 3M, as to whether they would succeed or not and, then, anybody who gave a performance rights to CTN would be encountering a risk in the sense that the amount that they would receive back for that performance rights, performance right, would be quite uncertain. If 3M succeeded they could get a substantial amount of money for their performance rights but if 3M did not succeed, they would get very little and this risk would then be that of others learning

or knowing about what terms they made those deals on and whenever anybody sells his service to anybody and there are alternatives, the people to whom he sells it, there is a risk involved.

Q Let's take the Shapiro-Bernstein Publishing Company.

Do you recall what 3M offered Shapiro-Bernstein?

A The only offer I recall is the one that Chiantia mentioned in his --

Q Let's take that one. What was your offer?

A As I remember, it was $30,000. That is my recollection. I could be wrong. And that he then got an additional 15,000.

Q Do you know what the $30,000 was?

A An advance, not a payment but it was an advance.

Q And so he got an additional 15 advance and therefore, a total for the first year of 45,000?

A That is my recollection.

Q Do you know what the figure was for the second year?

A I don't recall.

Q Or the third year?

A I don't recall.

Q And do you know whether Mr. Chiantia had any

reasonable expectation for realizing on this venture a figure substantially in excess of $30,000 a year?

A I know him personally and he is a pretty good businessman and I am sure he expected to earn a fair amount or he wouldn't have made this arrangement for 30 or even $45,000, frankly.

Q What risk was Mr. Chiantia taking on this project?

A Well, assuming that it didn't go, assuming that 3M wasn't able to break into the market, Mr. Chiantia had $45,000 in his pocket, not his pocket literally -- the company did, he didn't get it personally. I know 3M fights very strongly, but that advance he would share with the writers but the risk was that somebody would come along and say, now I would like to bargain with you on this. I know what you did with 3M and with 3M you had a little different kind of an arrangement on performing rights. What you had was something that was associated a little bit more like mechanical reproduction.

In other words, you got your royalty on the number of mechanical instruments to reproduce and not in terms of how many times that was used thereafter. Now, I may come up with a new idea with you, Mr. Chiantia and

I want to bargain.

Well, if this new idea might in some ingenius mind, and there always are people coming up with deals which result in a less advantageous arrangement than the normal performance rights, where you get paid each time it is used commercially, he would have had a risk in doing that.

Q Was his company out of pocket in any way as a result of signing that contract?

A Not to my knowledge.

Q Do you know what the cost to Mr. Chiantia's music publishing companies was in connection with that project, expenses?

A I can't conceive of it being very much. Maybe even -- just nominal. Only the time he put in talking and the few phone calls.

Q Transactions?

A Yes. That is not the only risk, of course, the business assumes. I know in my own business, if I don't watch myself on rates and I change them from client to client and that gets learned, I am in trouble so that each time I undertake something, I hesitate in arrangements with anybody unless this is consistent with the pattern that will be

beneficial to you.

Q Do you think Mr. Chiantia risked changing the structure of the performance rights market?

A It is possible.

MR. BLUMSTEIN: Mr. Chiantia was here. I wonder why those questions are directed to Mr. Nathan.

THE COURT: Because Mr. Nathan talked in the 3M situation about the question of risk involved.

It is proper.

A I wouldn't say Mr. Hruska, in answer to that, that I thought was great, but I explained before the very fact that to agreed to a new pattern, to my knowledge I could be wrong, to my knowledge had not prevailed before this so much per disk or per tape, I can see this is an element that might come back to haunt him in some future negotiations.

It may be remote but it is a possibility.

Q You think this was a very small risk in the 3M transaction?

A Yes, I would think it was a small risk.

Q And particularly because this was a new and experimental use?

A Yes, that's correct.

Q You mentioned the fact on direct examination that you knew that 3M had to get 700 songs.

A That is my understanding for that first series -- there were 700 songs required.

Q Do you know the period of time that 3M had within which to obtain rights to those songs?

A I recollect a period of many months, but I wouldn't, I would not say that I know that it was that number of months. I don't know for certain what that time is.

Q Do you know whether 3M went into the production of those tapes before or after it had nailed down rights to those 700 songs?

A I don't know whether it did. I would assume it waited. This business concern would be likely to wait before its market, wait until it has its product.

Q Do you know whether there was any need for 3M to obtain the rights for nearly all or even most of the music that it was negotiating for?

THE COURT: A legal need?

MR. HRUSKA: No. A business, an economic need.

A Before it went into production?

Q Yes.

A Well, I don't really know.

THE COURT: Before it manufactured the tapes? I am not certain what you mean.

MR. HRUSKA: Yes, your Honor.

A I don't know, but if I were a 3M executive negotiating this, I would be inclined to wait until I had my commitments.

Q Perhaps I confused you.

What I meant by the question was this -- do you know whether there was any need from 3M's standpoint in terms of making this venture go to obtain nearly all or even most of the songs that it was attempting to license from the publishers? In other words, how high did the batting average of 3M have to be, if you know, in terms of the songs they were seeking from publishers in order to give this venture a reasonable opportunity of success?

A I don't really know. I don't know how they -- whether it was all one tape and you couldn't sell until you had the whole 700 or whether you wouldn't go out and sell or try to get subscribers until you could tell them what your whole 700 were, whether you could -- I don't really know.

Q I think this is the fault of my question, Mr. Nathan.

Let me go back a step. 3M had infinite variety of songs to choose from, to choose 700 from to put on this tape. It approached a number of publishers. As it approached a publisher 3M had in its mind a possible selection of compositions from that publishers catalog and each time it approached the publisher, with respect to each publisher it had a selection in mind.

Do you have any idea how high 3M's batting average had to be with respect to each publisher in putting together that group of 700 songs, 700 songs of sufficient quality to make this venture go?

A No, I really don't.

Q How would you compare the 3M bypass to a bypass by the CBS television network in terms of the threat that it would pose to the continuation of the present ASCAP system?

MR. BLUMSTEIN: Threat to whom? May I have Mr. Bruska tell us, please?

MR. BRUSKA: Threat to the system, threat to those who are in favor of the preservation of the present system.

A Well, I find that almost impossible to answer because, as I have said in the beginning, there are so many

elements in the user category -- I would find it hard to think that the 3M system if it succeeded and I were a publisher, producer, that I would feel this threat in my relationship with local radio broadcasting, for instance. I could conceive of that threatening ASCAP's relationship, say, with Minak. So that, you know, as a publisher or a member of ASCAP, I don't see how I could judge the success of 3M in its relationship to everything.

Similarly, I think that the success of CTN has to be thought of in connection with threats, say, to NBC and CBS relationship to ASCAP.

Again, as a publisher or writer, member of ASCAP, I am not sure I would see a risk to gain the radio broadcasting relationship. I can't judge these relative risks unless I was thinking specifically where the risk would arise, risk with respect to what.

Q You said a couple of things yesterday which perhaps are relevant to such evaluation. You said 3M was a midget and also that it was of new and experimental use.

A Yes.

Q Does that analysis provide you with any assistance in making this sort of evaluation?

A Yes, it does. I think certainly that the people of ASCAP would not regard that with the same concern

but, on the other hand, I think -- in all economics you are asking me one side of the coin. I hesitate to answer one without making it clear that there is another side of the coin, namely, if a person says no to CTN -- to 3M, he is saying no to something he thinks is small and speculative. If he says no to Columbia Television Networks, he is saying no to something big with a great big pot of gold relative to 3M.

Q What was the expectation with regard to a music publisher in accepting the 3M guarantee advances and prospects of future income?

A I just mentioned that with respect to a new system that might have real problems. I emphasized before that to Sal Chiantia, he got $45,000, and I think the implication of your question, I answered it right, I doubt if it cost him much money to get that $45,000.

Q Is it an all win, no lose proposition, Mr. Nathan?

A No. I said I thinkthis could be a big lose proposition to take a 3 cent per disk approach.

Q Five cents, wasn't it, five cents per song per tape sold?

A I thought it was 3 cents.

MR. BLUMSTEIN: Mr. Nathan is talking about performance rights.

A Performance rights, 3 cents.

Q Performance rights, 3 cents?

A Yes.

Q Mechanical rights 2 cents?

A Yes.

Q Did the publisher get a mechanical rights payment of 2 cents a tape if he did not license the performance rights at 3 cents a tape?

A If there were another mechanism for the distribution he would get it.

Q In the deal as posed by 3M.

A That's right.

Q It was five cents per song per tape sold, right?

A Three cents for performance rights and two cents for mechanical. I can't agree that it is zero loss and all win. I think there are risks, risks in terms of the arrangement. Somebody may set those risks as minimal. In the long run they might turn out there is a risk.

Q Of the publishers who dealt with 3M, do you know how many checked with ASCAP before they did so to insure themselves that the ASCAP negotiations with 3M had irretrievably broken down?

A That question was asked of Mr. Chiantia. I

think it was Chiantia. He said -- I thought he said he thought most of them checked with ASCAP.

THE COURT: Mr. Kruska, we will take a morning recess at this time.

(Recess.)

Q Do you know, Mr. Nathan, how the amounts of money offered by the 3M deal to each publisher compared with that publisher's distributions from ASCAP in respect of all wire music services?

A No, I do not, sir.

Q Do you know how those figures compared to publishers distributions from ASCAP in respect of uses of their music on the CBS Television Network?

A I do not, sir.

Q Do you know whether each publisher approached by 3M had a reasonable basis to believe that he would do better financially by dealing directly with 3M than he would if 3M were to have dealt with ASCAP?

MR. BERNSTEIN: Objection, your Honor.

THE COURT: Sustained.

Q Do you know the names of the nine publishers approached by 3M on the first series who did not deal?

A I do not, sir.

Q Do you know the names of any of them?

THE COURT: Of the nine?

MR. HRUSKA: Yes, your Honor.

A I'm not certain of any names; no, sir.

Q I would like to show you a document, Mr. Nathan, which is PX 123 which is in evidence.

THE COURT: What is that, Mr. Hruska?

MR. HRUSKA: This is the Spina letter, your Honor, the West Coast Committee of AGAC, dated November 4, 1965.

Q Have you ever seen that document before, Mr. Nathan?

A I have not, sir.

Q And you do not know the significance of the writers whose names are listed toward the top of the letter?

A I--

MR. BLUMSTEIN: What do you mean by significance?

THE COURT: What do you mean?

Q Do you know, for example, how many songs those writers have in the ASCAP index of performed works?

A No, sir.

Q I would like to read a couple of brief portions of this document and ask you a question about those portions.

Look about the middle of the page, paragraph 2:

"The writers are to be advised by AGAC of the damaging results that affect the entire performing rights structure should they grant permission to the publishers."

The next to last paragraph on the page:

"Rather than place the writer in a position to have to answer the publishers' request and possibly get into an embarrassing or personal beef, it was felt that a solid front could be presented by AGAC as follows:

A form letter be sent along to be signed by the writers returned to AGAC and kept on file containing essentially the fact that they will not grant permission to any of the publishers on any of the songs involved. It was unanimously indicated here that they would pledge themselves to this cause and enlist most of the other important writers out here to do the same, whether a member of AGAC or not, and if the same could be done by the boys in New York, that a big dent

would be felt by the publishers who would not be able to deliver to 3M a large proportion of their catalogues and by weakening the publisher's posibion cause 3M to reconsider. While we had not put them out of business--"

THE COURT: Can't we ask the question now?

The flavor of that is pretty clear.

MR. IRUSKA: Right, your Honor.

Q Do those statements indicate to you an awareness of the risks posed to the preservation of the ASCAP system?

MR. BLUMSTEIN: I object, your Honor. As I recall it, this document was admitted for non-hearsay purposes.

MR. IRUSKA: State of mind, your Honor.

MR. HOPKIN: It is not state of mind.

THE COURT: I am going to sustain the objection on the ground I don't think Mr. Nathan's opinion--I have the highest regard for Mr. Nathan's opinion--would add anything to my own reaction to that letter. I believe it is for the judge to determine what that letter means.

If you want to ask whether anything contained in that letter would affect Mr. Nathan's previously expressed opinions, that I think would be relevant.

I am not suggesting it would. I don't think his explanation of what the letter means is very significant.

Q Let me ask this:

Do you know within any range the number of songs in the ASCAP Index of Performed Works which have been written by AGAC members?

A I don't really know that number, ratio; no, sir.

THE COURT: I say you look at your watch, Mr. Mruska. I want to assure you you are not required to take up the entire morning or day by cross examining Mr. Nathan.

MR. MRUSKA: I understand that, your Honor.

I really will try to bring this to a conclusion in this case as quickly as I can, although there are still a number of important matters to discuss.

THE COURT: I am sure.

Q You had stated yesterday in testimony, Mr. Nathan, that in a music in the can situation the publisher, other than, of music in the can would be able to utilize his bargaining power to the extent of obtaining printings.

Do you recall that?

MR. BLUMSTEIN: I don't recall it, Mr. Mruska. Do you have a page reference?

MR. MRUSKA: Sure.

Why don't we read it.

MR. BLUMSTEIN: Page?

MR. MRUSKA: 3903.

THE COURT: About music in the can?

MR. HRUSKA: Yes, your Honor. I am afraid I mispoke when I said it was yesterday, it was the day before.

Q The question was put to you on direct examination:

"Question. So I think that some sort of a reasonable accommodation will be worked out?

"Answer. I think something reasonable. I am not saying he won't have some premium. After all, in economic bargaining it is normal that one is going to exercise that strength in the bargaining which he has within reason that permits him to maintain" et cetera.

MR. [illegible]: Why not read the whole thing.

Q "--permits him to continue in continuity and economic relationships is very important.

"THE COURT: Presumably to the extent there is a premium, that would represent the value of his song in given circumstances, I take it?

"Answer. That is right.

"THE COURT: Those circumstances make the value more than it otherwise would be?

"Answer. That is correct, sir."

Q In a direct licensing situation in general, am I correct in assuming that in any given circumstance, in any given transaction, there would come to the mind of the seller, in this case the publisher, a range of prices within which he may expect to include a deal?

A I would expect that.

Q Now, in a music in the can situation--that is, where the network is approaching a publisher of music whose music has been recorded in a television program--do you believe that it's reasonable to expect in those circumstances that the publisher would be at the top side of that range, normal range, or even possibly somewhat above it?

A Well, first of all, I think one has to think of what the range. I think there would be a range for categories of music, a range for the type of music, a range for the item.

But given that publisher going to a producer having in mind--well, I might bargain somewhere between 800 and 1400 and I think at the high side 14 or so, if he comes up with the music in the can, it seems to me he has to go through that same process--namely, what would I be bargaining with him about or within what range if it weren't already in the can, if it were for future use", and then I think he thinks, "Well, now, another range; how much can I add on for the

fact that it is there," even there I think he has to think in his mind "How high can I go to take advantage of the facts in the range but how low can I, should I set my mind or my bargaining," and also, in between, "What is this going to do with my relationship with him and if I really hold him up. I am through; well, you know, to what extent will he comply and not hold it against me," and this again is a range and this is what I think would go through the mind of that publisher in his bargaining activities.

Q To the extent that there is a normal range, so I understand it, let's say 300 to 1400, to use your examples, for a non-[illegible] in the can situation, you would expect generally in a [illegible] in the can situation that the price would be at the upper end of that range or somewhat above it?

MR. GOLDSTEIN: I thought the question was just asked and answered, your Honor.

THE COURT: I believe it was and I understand Mr. Nathan to have said on direct and to confirm on cross that there would be some premium but that the premium would vary with the circumstances, the circumstances including those he just mentioned.

A That's correct.

You see, I can't answer quite your question if I think you are talking about one range. I was trying to intro-

duce a second range. I was saying there would be the range of what he thinks he could get for the music per se and then I sort of, he would think of another range--you know, how much is the advantage and what are the disadvantages in terms of the discontinuity and how much would it cost him to replace it and "at what point do I lose my relationship."

So that in a sense--

THE COURT: With all due respect to the science of which you are an expert, Mr. Nathan, wouldn't it be fair for me as a judge to say that even you can't tell how great that premium is going to be?

THE WITNESS: You cannot, sir, that's correct.

Q Now, assume that a representative of CBS approaches a music publisher who owns a song which is the key song in a production number on a musical variety program which CTN wants to rerun.

Assume that publisher must get the consent of his writer, the writer of that song, to the direct licensing transaction.

A I'll assume that, yes.

Q And assume that the initial cost of that program was $200,000.

THE COURT: It's all been run once, I take it.

MR. HRUSKA: That was part of my hypothetical

but I think perhaps we will change that to present him with a cleaner case.

This is a program which has been placed in the can but hasn't been run yet--and then I'll move to the other situation.

THE COURT: All right.

Q Assume that that writer's total annual income attributable to CBS's use of his music is approximately $2,000 a year.

Do you believe that it is reasonable to conclude that in those circumstances that writer will not consent to that transaction unless he can obtain a figure which is substantially above the normal range in direct licensing transactions?

MR. BLUMSTEIN: Objection, your Honor. I don't think that by framing a hypothetical or by putting a lot of assumptions into the hypothetical we get around the problem that Mr. Nathan has already testified as to how he thinks it would operate in general terms.

He says it is not an exact science. He can't tell how large or how great the premium might be. I don't know where this is leading us.

THE COURT: Well, it refines the contours of his thinking. I believe I know what the answer is likely to be

on this but I'll allow it. I just don't want to do this at the expense of too much time, Mr. Hruska.

MR. HRUSKA: No, your Honor, I am going to ask very limited questions but I want to explore, if we can, the parameters.

THE COURT: Do you have the case in mind?

THE WITNESS: Yes, your Honor, I have the cases and I have the $200,000 sunk in this production and it is music in the can--

THE COURT: Of course you can get back to the question of how much the writer knows about how much you sunk into it.

THE WITNESS: I assume he knows it.

THE COURT: I assume he knows its a moderately elaborate production.

THE WITNESS: But, I would have to--

THE COURT: We haven't yet found out whether his marital relations are happy or not.

THE WITNESS: Well, that would be interesting, but I need more pertinents, your Honor.

I would like to know why his income is two, not more and not less, and might want to know what he thinks about--

THE COURT: Let's put it this way.

To what extent is your opinion as to the premium that would be demanded influenced by the size of the stake which the writer has in CBS income and his knowledge that CBS has spent a lot of money and badly needs his song.

A And, your Honor, and what his income may be from CBS in the future, also.

THE COURT: That's correct.

A Sure. If his stake, past, present and prospective is small, he would be inclined to want more for that music in the can. If his stake has been, is and likely to be larger, he would want, probably not demand as much.

THE COURT: Would you also consider it relevant that he might wonder whether his reputation within the entire profession or industry was being affected by how he carried on his business with CBS?

A Very important. I think--yes, I think if one developed a reputation for being a very, very difficult person to deal with, it is bound to affect him. Even his taxes may be a factor if he happened to be in a very high marginal bracket, although we have changed our margins down but that might even be a factor.

So, there are a whole variety of circumstances. But the bigger the stake, the more reasonable he is likely to be.

Q Can you conceive of circumstances, Mr. Nathan, in which writers approached with respect to music in the can transactions could conclude that the amount of money that they could obtain in such a transaction might be far in excess of their entire future earnings from CTN use of their music?

A I can't conceive of that. I really don't--you know, thinking further about it, you give me a lot of these assumptions and they sort of get into a sort of a computer.

For instance, I can see the obverse, a man getting $2,000 from CTN and now he has a hit song or a feature going into this variety show and it is in the can and he, with this little $2,000 a year, maybe never had a feature and here, suddenly, it is a great benefit to him in terms of his future and opportunities and he might be bent over backwards to be most reasonable because of that--the consequences of that very decision in itself and not just what, you know, his relations with CTN would be.

So, this could just work the other way and the small stake would make him one anxious to bend over to be reasonable because this is very important to his growth and development.

Q Mr. Nathan, his Honor said something the other day about maybe you will be retained by CTN.

I would like to ask you, if you were retained by CTI, would you advise CT voluntarily to put itself in the position of facing the prospect, without an ASCAP license, of having a very large inventory of programs in the can to which CTB had no right to use the music?

MR. BLUMSTEIN: I will object, your Honor. Large inventory in relation to what, in relation to what aspect of the operations of CTB.

I just don't think there are enough facts in that questionfor anybody to possibly answer it.

THE COURT: As I recall, we have discussed, subject to precise determination--

MR. HRUSKA: An inventory of a hundred million.

THE COURT: --a possibility of an inventory at a hundred million dollars and what other details is it that you think ought to be in the question?

MR. BLUMSTEIN: I just don't think Mr. Nathan can possibly answer the question.

If he can, I am willing to listen to the answer.

THE COURT: I am not saying he can either but the question is whether it is permissible to ask him.

I'll allow the question.

THE WITNESS: I would say to my client, how much is involved, how much is the music involved in there, how

much is this music of these different categories and I would then call in one of the producers who bargained and say, what do you think the premium might be, because I honestly, as I said in response to his Honor's question before, think that there would be a premium but I think it could be moderate, of a hundred million dollars, in the can--I don't know how much the music costs, the replacement would be, if you had to dub in, fill in a new song.

But I don't think that the magnitude of the cost would be so big it would be prohibitive to their going ahead with something about which they had convictions.

THE COURT: To advise them, wouldn't you have to know what they expected to gain?

THE WITNESS: Oh, that, well, yes. If I was advising across the board, to be perfectly frank I say, Mr. Uruska, I have my doubts because I think the need for it derives from a decision about which I have grave economic doubts.

Q And you now are not in possession of such facts to enable you to render meaningful advice on that subject?

A That's correct, sir.

Q I would like to turn to the per use system about which you gave testimony on direct.

You testified, as I recall it, about what you

believed to be a ceiling as to it and what would happen if the ceiling was met at this level or that level.

At one point in your testimony, Mr. Nathan, you said something I would like to explore a moment--that if the per use rates were set low enough, there would be massive withdrawals by ASCAP members of their music from the per use license.

MR. BLUMSTEIN: Can I have a page reference on that, please, Mr. Brunka? I believe it was two days ago.

Q Is that a true statement, that there would be massive withdrawals if the rate were set low enough?

A Yes, I think that would tend to happen, if the rate were such as the members sat down and figured, "Well, under these rates, we would get instead of 4.3 million, minus expenses, a gross of a million and a half, and at such a low rate we just feel that nothing can happen under ASCAP and staying in merely has that as a weapon against our level that we can bargain," yes, I think they would withdraw en masse.

I would.

Q I believe you indicated this but let me ask you the original question -- am I correct in assuming that there is some point higher than the massive withdrawal point at which prominent people like Irving Berlin and Rogers and Hammerstein and the Cole Porter Estate, et cetera, would withdraw from the system?

A Well, of course it is going to be by gradation and I don't know what that point is, but the point at where you begin to get more selective, so to speak, withdrawal, more limited withdrawal, at that point you are going to have a very real testing of the ceiling into how -- whether the people who have withdrawn are able to bargain, are

able to get anywhere.

But selective withdrawal would be quite different from massive. I think it has to be very, very low to get massive withdrawal.

Q Right. I am talking at the moment of selective withdrawal and people of real stature like the ones we mentioned. The Beatles, I suppose would be in the same group.

A Right.

Q And the proprietor of Happy Birthday.

A Yes.

Q Now, when people withdraw from this per use system, they would do so because they would believe that they can maximize their revenues by withdrawing, is that so?

A I think that is why they would withdraw.

Q Better off out than in, in effect?

A I think they could get more. They would move out first, because they thought they could get more under direct negotiation than they can under the per use rate.

Q Now, between these two points, the massive withdrawal point and the point of selective withdrawl by the top people in the profession, is there some midway point where other writers and publishers with withdraw?

A Well, this point, I think, would depend very, very considerably on what happened to those who first withdrew. This is the point I emphasized the other day.

Q If the experience of the writers and publishers who do withdraw is favorable, rather than unfavorable, then others are likely to follow?

A Oh, if it were favorable -- I don't believe it would be unless, and I said, I feel strongly it wouldn't -- if it were favorable, it would be encouraging to others to withdraw.

Q Now, let's assume that the per use rates are set at a point midway between the massive withdrawal point and the highly selective withdrawal point so that more withdraw than just the very zenith of the profession, the Rogers and Hammersteins and the Cole Porters and so forth, and some of the music publishing companies are in this group, maybe some of the larger ones in this group of top 14.

Is it reasonable to assume because of the size of the group withdrawal that their experience will not be unfavorable?

THE COURT: What size group are you considering?

MR. HRUSKA: I would be happy to give specific examples.

Q This group would include the people we mentioned

before, Rogers and Hammersteins, Cole Porter, Lerner and Lowe, Burt Bachrach, the Beetles, it would include people at the level of Cy Coleman and Johnny Green. It would include Warner Bros. and Chappell and Shapiro-Bernstein and the Edwin H. Morris Publishing Company?

A And all their repertoires.

Q Yes.

MR. BIUMSTEIN: Is that it?

MR. HRUSKA: Let's stop right there.

MR. BIUMSTEIN: Everything else is in.

MR. HRUSKA: Right.

A Well, this poses a very real problem. I have to think about it, because I couldn't conceive of this happening unless the rate were very very low. I think that here is a brand new circumstance in which this per use rate or rates, and I don't know how they stack up because, also, the decision about withdrawal or not depends in very considerable measure not just on a conceptual level of rates, but it depends on levels by songs or by small categories so that it becomes meaningful, and I think that it would have to be awfully low for this magnitude of repertoire to be withdrawn and, obviously, if it were very low, very sizeable, you move into a direct licensing straightaway.

THE COURT: May I ask a question which may bring the whole structure of this discussion tumbling down and with no deliberate intention of doing so, but I want to be sure we are building on a secure foundation here.

What isyour reaction to this presentation -- would it not be possible that once CBS prevailed in this litigation and the Court orders the parties to negotiate for a per use fee structure, isn't it reasonable to assume that the parties would reach a fee structure which was satisfactory to the ASCAP members -- I don't mean every single member of course, but however they decide these things within the organization -- and if it was not satisfactory, then the matter would come to the Court.

And is it not reasonable to assume that the Court's authority and ability to command a result might again bring about a negotiated arrangement which was at least accepted if not satisfactory and if the same distribution system continued in ASCAP as was in existence before, is there any reason to believe that anybody would withdraw under the circumstances because he believed he could do better?

I don't know the answer to my question.

A Yes. Well, your Honor --

THE COURT: I don't have any predilections.

THE WITNESS: My problem with this is that as I understand CTN's purpose, the per use schedule is not a real schedule. It is an interim device to be certain that CBS or Columbia Television is in a good position in the process of moving to a direct licensing.

THE COURT: When you say that, I assume what you mean is what their attitude towards the schedule is, is that right?

THE WITNESS: Well, as I remember Dr. Fisher's statement, I thinkhe said it doesn't make any difference where the Court sets the fee or where they bargain, it is going to adjust itself by the direct licensing.

THE COURT: Perhaps I am asking you whether you agree with that.

THE WITNESS: Yes. I think a per use license is being pursued by Columbia Television -- I mean, after all it is their game they are going after and as I understand what Columbia wants is a negotiation or a Court settled per use rate which they can use -- I am sure they object when I say I think they use this as an economic weapon to hold down or push down or keep down the direct license rates in the process.

THE COURT: Well, I think there is a difference, though, between what CTN's objective may be and what may

be the actual outcome of the situation.

I am asking you whether you believe that just because that is their objective that is a necessary negotiated or imposed result?

A Well, you see, your Honor, where I have a difficulty as an economist is at what point up and down this range of rates one can, in essence, arrive at a pattern, composition of rates which on the one hand is manageable and which on the other hand begins to reflect what is pursued.

You see, I can see the blanket rate in a sense. Here is a whole variety they are making available, "Pay for it, we will bargain it down, you can use anything you want," and I can see the other side where you bargain down the line with so much per song -- "I want $12 for this and $1200 for that," and they bargain it out.

But, in between, now we are arriving at something entirely different about which we have had no experience and that in the attempt to bargain out feature music and theme and background, but all kinds of ranges within it.

When I read the patterns already prevailing just in the distribution, let alone in the concept of bargaining, I find, your Honor, a very difficult concept of trying to envisage what are the criteria. It is a whole new game.

I understand the criteria in a blanket license. You know, what is involved, here it is, here is the whole repertoire. I say -- Mr. Finkelstein says it is worth six million, Mr. Piper may have said three million. They battled and come out to 3.1 or 4.7, but here we are in a totally new area which in essence has not been tried, but I do understand the other side of the coin that if you go down and start having a direct licensing and each one bargains directly, I can understand how you arrive at a price.

But, your Honor, in between that, how you work out a system of categories, which categories would be sufficiently small so that the objective that is being sought here, namely, the market place role, the simulation market place really would work, I find it hard to conceive of that.

THE COURT: So your conclusion is you don't know at what level that whole structure --

THE WITNESS: I don't really.

THE COURT: Mr. Hruska, go ahead. I am sorry.

Q I think we were at the point of discussing the proposition whether if the group of writers and publishers which I named were to withdraw from the system, whether the very fact that the group consisted of those people would virtually insure the fact that their experience would be favorable rather than unfavorable?

A The experience of those who did withdraw?

Q Yes.

A Well, favorable in what respect?

Q I am using the words favorable and unfavorable, sir, because those were your words. You said if the experience of the people who withdrew was unfavorable, that would discourage others from withdrawing. I take it you meant if their experience was favorable, that would encourage others to withdraw?

A Yes, yes. To the extent that those who withdrew were able to negotiate and sell their music to the producers of CTN above the ceiling -- above the per use rate that had been negotiated, I think that would encourage others to withdraw.

Q That wasn't exactly my question. It was: Doesn't the fact that a group of this significance withdraws virtually guarantee that the withdrawing groups' experience will be favorable?

A No, I don't think it guarantees it at all. I think that the Columbia Television Network and its producers and packagers will seek, as any intelligent, specific, economic entity will do, to still try to get its music at the lowest price. They look over on this side of the street and they see all these publishing companies, prominent, which you have mentioned, sizeable repertoires, and they see on the other side those who are still in ASCAP where a ceiling rate has been arranged and they can bargain on direct licensing. That company is going to look at every possible substitute it can find within the repertoire that ASCAP has. They are not going to say, well, all these big ones have come out and we are just going to bargain with them. Those big ones have come out because presumably they think they can get better than the per use that has been negotiated, presumably.

CTN and its producers are going to fight like the devil not to bargain with them above the rate and that way bring the others out. That way they lose their bargaining power if everyone would come out.

Q Am I correct in assuming, Mr. Nathan, that you do not know the extent to which CTN programs now use the music owned or written by the people or companies that I mentioned in this hypothetical example?

A Of its non-theme and background or its pure theme and background plus the non-theme background category, I don't know what propotion is in each company you mentioned.

Q Companies or writers?

A Or writers.

Q If you were to learn that those companies and those people represented as much as 15 per cent of CTN's current use of published music, would that influence your judgment?

A No, it wouldn't. If I were CTN's bargainer, negotiator, I would struggle hard to satisfy myself with the other 85 per cent and leave these 15 out in the cold if I could.

Q Even if it was injuring your programs?

A Well, obviously it comes on a point -- I don't know where that point is -- where one wants to injure the programs. Again I say when you have three networks, and not a large number, there is quite a bit of roomfor program adjustment I would think.

Q There comes a point. We were talking about points along the scale starting from the massive withdrawal point on the bottom and a highly selective withdrawal point on the top.

I believe you agree with me that at various points along that graph other publishers and writers would pop out of the per use system and withdraw.

Do you agree that where you reach the point on this graph where enough writers and publishers pop out of the per use system so that it starts hurting or impairing the programs on CTN, if CTN were not to deal with these people, that the experience of the people who withdrew would be sufficiently favorable so as not to discourage others from withdrawing --

MR. BLUMSTEIN: Your Honor --

Q -- or to encourage others to withdraw?

MR. BLUMSTEIN: With all due respect, your Honor, there has got to come a time when this sort of questioning has got to end. We have been over this and over this and we have Mr. Nathan's views. I don't see why Mr. Hruska at this point should have to ask the question in all kinds of different variations. It is essentially the same answer.

MR. HRUSKA: Your Honor, this question is, I believe, the most significant question I can ask Mr. Nathan on his view concerning the ceiling effect, alleged ceiling effect, of the per use system.

What is positive here --

THE COURT: I will allow this question. I think that is sufficient then on the ceiling effect. I think it is a wrap-up question.

MR. HRUSKA: Yes, it is.

THE COURT: I will allow it as that.

THE WITNESS: Your Honor, let me try to point out what my difficulties with this issue and what I think the factors are.

First of all, I think it depends on the level, as I pointed out, at which the per use license rates were set, very, very low, they will all come out. Somewhere along that point, say the 15 per cent which you have mentioned, will feel that their music of such value that they can negotiate above that. I myself have said that I think that Columbia Television Network and their producers would struggle very, very hard not to deal at all with these withdrawers knowing they went above the ceiling and they tried to negotiate with the 85.

You have said then up to a point that may work, but then there comes a point when their program is hurt. I accept that.

If they, however, keep only that criterion in mind, program hurt, they may bargain with only two per cent out of this 15, 2/15's. The other 13 are left out in the cold.

You said to me if they really bargain with these people that have come out and they, therefore, have achieved, say, rates above the per use rate, that that will encourage others to come out. I can envisage, Mr. Hruska, where if 13 of them are in trouble and two of them are going well, the others figure, gee, I don't want that 7 to 1 odds. Those 13 that are not doing well in relation to those 15 are pretty big people in the field. I am not that big. I am not going to come out.

I am saying it will be silly for me to sit here and say I think under these circumstances so many will withdraw and so many won't. You can't tell. You are dealing --

THE COURT: All you can do is describe the factors which you think will influence decisions?

THE WITNESS: That is correct, sir.

Q Did you read the testimony -- I think we mentioned this yesterday -- concerning the fact that inthe per use

system as it is contemplated by CTN publishers and writers who did withdraw -- copyright owners who did withdraw would have an opportunity to advise CTN of any information they wanted pertinent to their compositions and that that information would be fed into the computer system so that it would be available as part of the status report on any composition in which the producer expresses an interest.

Do you recall that?

A Yes.

Q All right. One of the points you made, Mr. Nathan, regarding disinclination to withdraw, as I think you put it, was the fact that the copyright proprietor who was withdrawing would kind of send off negative waves, indicate I am going to be a big, bad troublemaker to deal with, do you remember that?

A Yes. I thought he increased CTN's resistance to bargain.

Q Has it occurred to you, sir, and if so would it influence your judgment that the copyright proprietor upon withdrawing could counteract any such negative signals by express language as part of the information he gives to CTN, such as in words or substance, I am not trying to hold you up, I just want to talk about it?

MR. BLUMSTEIN: Objection, your Honor.

THE COURT: I will allow you to answer whether that has occurred to you, whether it would influence your judgment.

A I think he would say to -- he would have to say to CTN, I have come out. I would like to bargain with you. The reason I come out, I want more than the per use license rate. If he were honest --

Q For some types of uses?

A Yes, some types, yes. That is right, yes. For some types of music whatever he withdrew.

THE COURT: Am I naive in assuming no matter what he said to CTN, CTN would be likely to assume or anybody would on the other side of the table that he came out to improve his position, that might involve the use of his music more frequently perhaps at a lower rate per use, it might involve getting paid more per certain pieces than the ASCAP schedule we are talking about, the per use schedule, but, in any event, clearly he wouldn't come out except to improve his situation on an overall basis.

THE WITNESS: That is what I said, your Honor, the signal that is telegraphed when he comes out and he says to CTN, here I am.

Q Let's take Irving Berlin as one arch type of a withdrawer.

It is reasonable for a man in Mr.Berlin's position to assume that for some types of uses of his music such as feature performance on a prime time musical variety program that he could receive more than the top per use rate, but that on other types of uses of his music he would receive less than the per use rate?

A That is right, sure.

Q All right. Wouldn't it be rational for Mr. Berlin then to withdraw and say to CTN in this notice, that it is my position that on prime time feature uses on variety programs of my works, I will want to negotiate and I will expect a price higher than the par use level, but on other types of uses I might well be receptive to prices below that level.

MR. BLUMSTEIN: Are we talking about White Christmas in --

THE COURT: Mr. Hruska, I am going to sustain an objection to the question. I really feel this area has beenfully explored. We are all agreed that there are a variety of factors which will affect the behavior of the parties on both sides, but that each of them will attempt to maximize the benefits of the situation to them.

I think I just put pretty much the same question to Mr. Nathan, whatever the reasons are for which Mr. Berlin in the case you posit might withdraw. I can't come to any other conclusion from either the testimony I have heard or any argument I have heard proffered that he would have been withdrawing for any reason except to improve his situation.

MR. HRUSKA: Yes, your Honor. I am trying to make here a subsidiary point, and that is that in reality the factors which Mr. Nathan has brought forward as arguments against the likelihood of withdrawal are in reality not factors which are going to occur.

Mr. Nathan, as I understood his testimony, had indicated on direct that he thought the biggest reason why writers and publishers would not withdraw was because they would be afraid that were they to withdraw CTN would regard them as in effect troublemakers, people who are going to insist on all occasions on prices above the per use level.

THE COURT: I don't think that is a proper characterization of Mr. Nathan's testimony. He gave reasons why he felt they would not withdraw. I wouldn't characterize it as having said that CBS would regard them as troublemakers.

In any event, I do believe that the whole

subject has been adequately explored.

You are perfectly free to argue at the appropriate time that Mr. Nathan's testimony describes facts which will not occur and you are free to put on rebuttal testimony to that effect.

MR. HRUSKA: I would like to take one moment, your Honor, on one more hypothetical regarding the per use system, and that is for Mr. Nathan to assume that the per use rate for a feature performance on the CBS Television Network is ste at $800.

Q At that figure, Mr. Nathan, would you expect the truly unique music, music composed by people of the statute of Irving Berlin, to be withdrawing from the system?

A This is the per use rate set by negotiation or the Court?

Q Right.

A I can't really answer because I don't know enough about rate structures and rate differences and rate levels by different composers. I wouldn't be in a position to answer that really.

Q Do you know that $800 is the present ASCAP rate, roughly $800 is the present ASCAP rate of distribution for a feature use of an ASCAP composition on contract?

MR. BLUMSTEIN: Is that total, Mr. Hruska?

MR. HRUSKA: Writers and publishers, yes. I think it is actually between 8 and $900.

THE COURT: All right. Are you satisfied with Mr. Hruska's answer?

MR. BLUMSTEIN: Yes.

THE COURT: Do you want to know whether Mr. Nathan knows that or whether he knows that which would answer your question?

MR. HRUSKA: Really the latter, your Honor.

A Knowing that, since that is a distribution consideration among ASCAP's members, I stand by what I have said before, that I don't think that is an appropriate measure of the market value aspect that would derive out of seeking to set a per use rate or direct licensing.

Q Could you assume that at a per use rate of $800 for a feature performance on CTI, that what I think you referred to from time to time as the fungible music, would not be withdrawn from the per use system?

A Will you further assume--if I may ask, is a further assumption that the $800, forgetting about getting involved in the distribution of ASCAP members--I was going to say it was the average on a direct licensing basis, but we have no basis for direct licensing.

See, I find it hard, Mr. Hruska, to translate this value for distribution among ASCAP members over to the bargaining between the copyright holder and the user. If you say, well, 800 is an average, that would be set in this per use or 800--I don't think the withdrawal will take place by everybody above the average, no.

Q That wasn't the question, Mr. Nathan. The question was whether the fungible music would be withdrawn if the rate were $800, per use rate was $800?

MR. BLUMSTEIN: I'll object to that. I don't know what fungible music is.

THE COURT: Where there are substitutes available?

MR. HRUSKA: Right, your Honor. Mr. Nathan had used that term. I thought it would be a term meaningful to him.

A Well, it is meaningful to me. I still don't know wh to relate that 800 to. That's my problem. If we had had experience and you said to me, Mr. Nathan, the average amount that has now been set on the per use for features is $800, but we know through some experience of direct licensing, assume we had it, that a really outstanding piece is $3200 and a fairly unique one is 2400 and something, this is 1600, you give me a range of figures and said, would anything-- would that 800 cause withdrawal, then I would have a better basis.

As it stands, that 800 doesn't mean much to me.

THE COURT: May I ask this general question? To the extent that per use rates might be set as a result of this litigation which were for all practical purposes the same as what the average distribution was for that type of composition

today, do you think that that would limit the number of withdrawals from the per use system?

In other words, if people come out roughly the same economically under the per use set up as they are coming out now, do you think that would limit their withdrawal or do you think that their withdrawal motivation would depend on whether they think that they could do better by breaking away?

THE WITNESS: The withdrawal would be limited by those who think they could do better by that, by substantially above that. It would be an average we are talking about.

Q You testified yesterday, Mr. Nathan, that writers and publishers were happy with the present ASCAP distribution system apart from matters that are raised from time to time such as the current proceeding on day time programs.

A I think I said that.

Q Doesn't that give you some indication, Mr. Nathan, as to what that present $800 figure represents in terms of an average?

A Not necessarily. It represents a degree of satisfaction with a system which gives him $800 per performance, per feature selection under this arrangement, that is under the blanket arrangement.

So they are getting 800. If it is used a thousand times, I assume they get 800,000.

That decision as to how it is distributed it seems to me must relate to this blanket approach and how we distributed under the blanket approach. I can't see how a person says, well, I get $800 here in this distribution, under the system. I think it is a good system. It's an efficient system. I am happy. I don't need to bother. Now suddenly they are coming to me and suggesting a new system that is in essence direct licensing. I don't know what I'm going to be involved in doing. $800 maybe just nutty for me to accept. I maybe involved in so much negotiation, so much recordkeeping and so much this and so much that, 800 makes no sense to me.

THE COURT: Isn't there also a limit which presently exists that the $800 that is the feature payment now is part of a package for which he gets certain other opportunities?

THE WITNESS: Yes.

THE COURT: And it may be less than what he thinks it is really worth, he is willing to take $800 because he gets certain other advantages in the present system?

THE WITNESS: That is correct. I assume he says ASCAP will go on with respect to all these other services

it provides, local radio and the like.

I think the whole new set of gears will go to work in his mind about the price on a direct licensing.

Q Mr. Nathan, isn't it economically reasonable to conclude that if ASCAP members believed that the fair market value of their works was a lot higher, appreciably higher, than what they are now receiving from ASCAP in performance distributions for those works, that they would leave ASCAP and obtain the fair market value for uses of their compositions?

THE COURT: If it was a per use system or now?

MR. HRUSKA: Now, your Honor.

MR. BLUMSTEIN: Your Honor, again I think this question has been asked in various forms before and already answered?

MR. HRUSKA: No, it has not been asked in various forms, your Honor. It is a question which again I think is essential to--

THE COURT: I don't see how that is going to cast any light on what you are trying to get Mr. Nathan to agree that the ASCAP member considers that the present situation is reasonable.

MR. HRUSKA: No, your Honor. He has already agreed to that.

THE COURT: That the present rate structure is considered reasonable by its members or else they would leave.

MR. HRUSKA: Yes, that is what I am getting at here. The reason I am getting at it is really for the next question.

THE COURT: I understand the reason you are getting at it. What I am thinking through is whether I could accept Mr. Nathan's view on such a generalized question. I am prepared to believe if a demonstration is made of how prices are reached and so forth, that certain people may regard them as reasonable.

To say that the average ASCAP member thinks that everything is perfectly fine or that $800 is proper as a feature payment at the present time seems to me much to general to have any practical application.

MR. HRUSKA: My point is, your Honor, that given the present rate of distribution, given the apparent satisfaction with that rate of distribution--

THE COURT: What evidence is there of apparent satisfaction?

MR. HRUSKA: The simple reason, your Honor, that the system continues If writers and publishers believe in mass that that system was far less than the fair market value

of their works they could not possibly as a matter--

THE COURT: Why does CTN have a blanket license at the moment? It is certainly not satisfied with it.

MR. HRUSKA: That is why the lawsuit has been brought.

THE COURT: I understand. What I am trying to bring out, there are some things that people continue to do, but not necessarily be satisfied with. They take it as the least of the available alternatives.

MR. HRUSKA: Except for the fact, your Honor, that ASCAP represents a marketing device which is perpetuated by writers and publishers.

THE COURT: I'm prepared as I have been on other occasions, when the time comes to hear argument on this, to read what you have to say. I just say that it seems to me it is a question of argumentation and that my own reaction to an attempt to prove some of these propositions by talking about the mythical man who is the average ASCAP man is not very meaningful.

MR. HRUSKA: Then perhaps we should break for the morning, your Honor.

MR. BLUMSTEIN: Your Honor, could we inquire of Mr. Hruska about how much longer he would be with Mr. Nathan?

MR. HRUSKA: I think I would be in a better posi-

tion to answer that when we come back at 2.

I will try to give an answer to it now.

I believe, your Honor, that I have approximately one hour left.

THE COURT: All right.

We are adjourned until 2 o'clock.

(Luncheon recess until 2 o'clock p.m.)

AFTERNOON SESSION

2 p.m.

ROBERT R. NATHAN resumed.

CONTINUED CROSS EXAMINATION

BY MR. HRUSKA:

Q On your direct examination, Mr. Nathan, at page 3929, where you were discussing music written for television programs in connection with the analysis of the per use system, you indicated, I believe, if I understand the testimony, that although music written for programs would not go into the per use system, nevertheless, somehow the per use rates established for that system would operate as ceiling prices for such music.

Do I have that correctly?

THE COURT: Why don't you show Mr. Nathan the passage you are referring to.

MR. HRUSKA: Right.

MR. BLUMSTEIN: What page is that?

MR. HRUSKA: 3929.

Q I think probably the heart of this starts at line 15. Perhaps I ought to read that so that the record now is clear as to what we are talking about.

THECOURT: If it is not too long.

MR. HRUSKA: It is a brief paragraph.

Q It says, any direct negotiation with the producer or packager doesn't entail withdrawal. It is a direct licensing, even prior to its getting into the ASCAP repertoire, It is a bargaining in which, obviously, the license--the per use rate is in mind as a ceiling as I think it would operate clearly there.

THE COURT: What is your question?

Q Was my statement of your--

Did my statement of your testimony accurately reflect your meaning?

A Could I have that statement read?

MR. BLUMSTEIN: Could we have the statement back?

THE COURT: Let me tell you what I make of Mr. Nathan's testimony and if he says I am correct you will, I hope, understand what I say and that is that where you are dealing with music that is written for a program, that is not yet published, even if you are under a per use system, the per use fee set for that kind of music will have an influence on the price that CTN or whoever, the user, and the buyer ultimately reach; that is, it will affect their negotiations by being in existence as a fee for comparable work; that is number one, and number two, that it is not a true withdrawal, which I think we all understand, because it never was in the pool.

A That's correct.

THE COURT: Does that sum up your meaning?

THE WITNESS: Yes, your Honor.

Q Could you explain how the per use rate would affect the price of this music?

A Well, the producer would obviously know that if he bargained with the writer only with respect to what was part A in that formula, A plus B equalling total income, if he bargained only with respect to the writer, writer income, the income for writing the song and that if the song then went into the ASCAP repertoire, it would be subject to this ceiling--to the per use rate, I beg your pardon.

Now, if he is going to bargain with that writer and to say, "Look, we are dealing here before this song is writen or completed, I will make a deal with you and pay you X hundreds of dollars or a thousand for the writing and I would like to negotiate the performance rights at the same time", he has in mind knowing what the amount would be if I went into the repertoire on per use and he will try to bargain for a lower rate and, as I said yesterday, I think the bargaining positionbetween these two parties is such that from an economic point of view I would expect him to prevail and to be successful in combining his writing payment bargaining with his performance rights bargaining and achieve a rate less

than the per use rate.

Q Do we agree, however, that the per use rate in these circumstances would not operate as a ceiling?

A Oh, no, I don't agree. I think it would operate as a ceiling because both the writer and the producer know that that per use rate would apply once it got into the repertoire--

Q If it went into the repertoire?

A If it went in and if they couldn't bargain after it went in at a lower rate but certainly it would be a ceiling.

Now, I think that a producer, to offer or to pay a man more than what would be available in that repertoire conclusion, it wouldn't be a very economic decision.

Q If the producer of the program and the writer of this music cannot agree on the price to be paid the writer then the music is not going to be written for this program, is it?

A No, if they can't agree on how much the payment is, the producer will turn to another writer.

Q So, of what earthly significance is the chain of thought that if the music is written and if it were to go in the repertoire it would be available to the producer at the per use rate? This music is never going to be written unless the producer and the writer can agree up front on the price.

A That's correct, but as long as he is negotiating he might as well negotiate the full price, namely -- you see, don't forget that under this new arrangement we now have, under a per use program, there is no more blanket license and the CBS has given to that producer X sum of money, which sum of money he has to use for setting up his program. That sum of money includes an amount of money for two components of music, namely, the writing of the music and the performance rights and, as I explained yesterday, without going into a long story, he has his own publisher participation in ASCAP to take into account and I think he is going to be bargaining, and awfully, awfully hard with that writer to get that at the very lowest price and he is going to want to pay that writer the lowest amount both as a writing and as a performance right.

Q I believe, sir, you went somewhat off.

The precise question is how can the per use system impose a ceiling price on music which never comes

into the system?

MR. BLUMSTEIN: Your Honor, it is perfectly obvious it can't.

MR. HRUSKA: Mr. Nathan has been testifying it could, your Honor.

MR. BLUMSTEIN: He has not.

THE COURT: I think he has indicated what influence he believes it has and that it would operate as a ceiling.

I must say that I have some question along the line that Mr. Hruska does as to why it would operate as a ceiling because of the contemplation of the writer that his work might go into the inventory.

On the other hand, I do see how it might operate as a ceiling and I invite your comments and Mr. Hruska's further questions if he wants, on this -- that the producer may know that he can get perfectly satisfactory substitute music at rate X and he just is not going to pay more.

Does that agree with your views?

THE WITNESS: Yes.

THE COURT: I can't remember the name of the series, but I think all of us remember it was ten years ago, when -- Richard Rogers wrote the background music for a series -- Victory at Sea -- and assuming that such

series were to be produced again and that the producers wanted to get a man of that distinction to write the background music.

Do you think that the existence of the fee would constitute a ceiling there?

A The existence of a fixed amount.

THE COURT: As a per use rate.

THE WITNESS: Well, your Honor, in this case, if the producer felt that getting this great composer added that much to it he might very well be willing to squeeze out of other things funds for that or even out of his own, but I think this would be the rare exception and by and large -- we must realize now that he is operating under a new set of conditions, Mr. Mruska. He now has to pay performing rights and he now has a budget and I have to assume that CBS has set a lower budget for music. If I am wrong, then my assumptions are wrong, but I can't believe they would go through this process, changing the system, without having that as a real goal and that is the conditions under which --

THE COURT: I just want to be sure that you agree with the enlargement of that statement that you made yesterday -- that is, that they would try to pay less than

they would have paid otherwise, because Mr. Hruska introduced the possibility of their attempting to keep the price from going up, which I understand is economically the same thing as trying to push it down.

A Yes.

Q Keep the price from escalating to the extent that it would have escalated in the judgment of the plaintiff if the present system were to continue.

THE COURT: Right.

A That's correct, yes. That's correct.

Q What would happen, Mr. Nathan, if the particular writer who was contacted by this producer to write for the program said simply, "I don't think that per use rate is high enough and you used to pay me a thousand dollars a week and under the per use rate I could expect another 500, but I want $2000."

Do you believe in all the circumstances like that the producer is going to be able to say sorry, it's only 1500 and that's it, take it or leave it?

A Well, first, I think the Richard Rogers example is an interesting one. I didn't say in all circumstances but I do think that the producer, given the constraints of the budget, given the elements which I introduced yesterday

that the producer would make a major effort to pay on the per use, knowing that per use is there, if the man puts his music in, I think that it would serve as a ceiling in that negotiation with -- you know, always there can be rare exceptions but I think overwhelmingly it would serve as a ceiling.

Q And can we agree that if let's say half of the writers who are now writing music for television programs refused to accept that price as ceiling but demanded more money, that that price would quickly cease acting as a "ceiling."

A It depends on what their bargaining power is. You know, half -- I don't know how many. If they formed together again and say they had a real strong union and they just said, we are not going to write any more music unless we get our fee of X amount and a performance rate of Y amount and that Y is above what ASCAP and CTN have negotiated or the Judge has set, if they have a good strong bargaining power and they say, 'We are striking, otherwise, and we are going to get the higher rate," it is possible they may.

Q I think I understand your testimony. Let me turn to a somewhat different but related subject.

Assume on a particular television program in today's world that the producer now spends $2000 a week in payments to the writer of original music for that program and that CBN now spends effectively an additional amount of $1000 for that program, and these are weekly figures.

Do you know what I mean when I say effectively?

A Is this an additional thousand for what purpose, for music?

Q I am going back to your testimony yesterday where you talked about CBN allocating its payments to ASCAP.

THE COURT: Certain portions of its ASCAP payments are allocated for the show.

MR. HRUSKA: Exactly.

Q That portion for the show is a thousand dollars.

A Yes, sir.

Q All right. Is it your belief, Mr. Nathan, that in a per use system the producer will be able to get that music for less than $3000?

A Yes, it is.

Q Would the same result occur in a direct licensing system?

A Yes.

Q So that that result has nothing to do with the existence of a per use system, this is the effect of direct licensing between producer and writer?

A Well, except that -- I should say that in a direct licensing where there is no per use, I would expect that this would also be the case because I think the budget would be pushed down and I think in most instances the producer would be successful in meeting that reduced budget. I think without the per use -- without the per use license functioning there, I think there would be a greater range in payments for music by CBN. In the aggregate I think the amount that goes for music will be less than it is now.

Q You said without the per use there would be a greater range.

Do you think the per use prices are going to be reverent points?

A If there is ever a ceiling -- You can't have a range. It is just like the mechanical reproduction. If I am right --

Q I didn't want to get back to the ceiling. We had spend enough time on it.

THE COURT: I understand Mr. Nathan's testimony either to be or to add up to the fact that the per use price for whatever category is in question would be a reverent,

yes, that everybody who was bargaining about music would look at that to see what it is as a sort of point of departure, is that right?

THE WITNESS: Yes,it would tend to be a point of departure down.

THE COURT: At the least it would hover over the atmospheres.

THE WITNESS: I think so.

THE COURT: All right.

Q Just to have some figures to talk about here, we are dealing with the original $3000 payment, which was 2000 by the producer, one thousand by CTN.

A Yes, sir.

Q We are now in a system of direct licensing or per use, you feel that figure will come down. Let's assume it comes down by $500.

A Yes, sir.

Q Is that a fairly realistic assumption within your frame of referance here?

A I suspect that if CTN were able to reduce the music costs by 1/6 in the first go-around, that would be a fair success.

Q All right. We are in a direct licensing system. Now what is being paid for this music on this program is

$2500?

A Yes.

Q $500 saving.

What makes that saving possible? Could you describe that in economic terms?

A Yes. I think that saving is made possible by a number of factors. First of all, the budget suddenly becomes a concerted or a concentrated or a focused budget dealing with both payments.

Now you have two different separate non-associated payments, one by the producer to the writer for writing the music and he, therefore, only bargains for that -- of course he and the writer have in mind what the prospects are from the ASCAP payments. But now suddenly we have a second factor, a change factor introduced where the producer and the writer are bargaining for two items, not one, namely the writing item and the per use or the direct licensing.

We have another factor introduced, and that is that now the total music payments is focused in one budget. CTN has disassociated itself from the bargaining individually. It is now not bargaining with ASCAP. It turns it over. Instead of having a bargaining between two forces, namely CTN and ASCAP for this four million, five million, $3 million, suddenly we have a multiplicity of bargaining by the

producers with the writers.

CTN -- again I express my assumption -- I believe it is correct -- will put a lower budget on music.

Given those set of forces, I believe that CTN and its producers will succeed in lowering the total price for music, the total cost to them for music.

Q The same music by the same composer?

A That's correct. The system will be a changed system.

Q Would you then agree, Mr. Nathan, in a direct licensing system $2500, to use the figure we have been working with, would be the fair market value of the music?

A It will be that market value which has been negotiated between the producer and the writer. It is a reflection of the bargained market value, yes, sir.

Q So that that $500, Mr. Nathan, is an index of the extent to which the present system would inflate the value of that music over fair market value?

MR. BLUMSTEIN: Objection, your Honor.

THE COURT: Overruled. Mr. Nathan can say no. It is a fair question.

A I was going to say or -- you can say that is an index of the degree to which achieved an in balance of bargaining of power would permit the Columbia Broadcasting Network

to reduce its cost of music by exercising its bargaining power far more strongly than it can now.

Q If CBS has that bargaining power now, why doesn't it or the producer of the program go to the writer and say:

Mr. Writer, you used to get a salary of $2,000, now it's got to be $1500.

A Well, I'd say that there are two limits in the bargaining power.

One is the salary to the writer and the other is to the payments to ASCAP.

THE COURT: Mr. Bruska, I have my own answer to that. I don't know if I'm entitled to take judicial notice of it or not. Even assuming that Mr. Nathan is correct, that you could do it--I don't necessarily assume that until I come to decide the case--even if you could do it you aren't doing it because you are coming to the court first to see whether you can get an arrangement which doesn't require you to take that risk.

I don't know whether that is consistent with the witness' views. I want to be frank to state that so that you know my point of view and you can put on evidence to the contrary if you think it is a mistake in conception or argue to the contrary. That is the way I feel about that particular question. If I were president of CBS, that is what I would do, too.

MR. HRUSKA: The point really is, your Honor, if CTN had the power to--

THE COURT: It is one thing to have the power and it is another thing to be persuaded that you have the power. I would assume that Mr. Nathan would say that if Mr. Paley absolutely persuaded him that he had the power, he would do it. The assumption I must proceed on is he is not persuaded that Mr. Nathan is right.

MR. HRUSKA: Your Honor, it is not CBS actually that deals with the writers of this music, as Mr. Nathan has pointed out and the record shows, it is the producers of the program who deal with the writers of the music.

The point is if the producers of the program who now bargains with the writer of the music on that program had the ability to get that writer to accept--

THE COURT: You didn't ask that question about the producers. My attitude towards the subject maybe different cast in those terms. If you did say CBS has the power to do that, why doesn't CBS do it--

MR. HRUSKA: I thought I added producers. You are probably right, your Honor.

THE COURT: At least that was the impression I had.

Q We have a writer who in todays system is receiving

$3,000 a program. One thousand is coming to him from ASCAP by virtue of payments made by CTN, 2,000 is coming to him by virtue of payments made by the producer. It is your understanding, true, that the writer and the producer of the program are now negotiating with each other and, as far as you know, bargaining as hard as they know how to bargain with respect to that $2,000 a week.

A Yes, sir.

Q All right.

Double that in a direct licensing situation that price is going from 3,000 to 2500.

A I will accept that.

Q Does the fact that in today's world the producer can not get that writer to take $1500 rather than $2,000 indicate to you that in a direct licensing situation that producer will not be able to get the writer to take $2500 instead of 3,000?

A The answer is no, it does not indicate that.

Q Do you believe that CTN will give the producer in the same set of facts a music budget of less than 2500?

A Well, I said before that if the CTN were able in the first go to get its total music cost down from 3,000 to 2300, I would regard that as pretty good, and I suspect that CTN may enter this new world by stages or steps. I think

a cut of 1/6 might be reasonable. I don't know. They might try to give him only 2,000. I am certain they are going to give him less. They are going to try to get away with less.

I think that is perfectly natural. They are going to make every effort to pay less. Whether it is 1/6 less, 1/3 less or 1/4, I don't know.

Q You believe it is going to be less?

A Yes, sir.

Q Let's call it for the sake of argument not 2500 but 2300, they give the producer 2300. The producer has got to deliver for this program $2500 worth of music.

We have established before in this market that would be the market value.

A Well--all right, I'm sorry. I didn't mean to interrupt.

Q Is it your belief that the producer will make up this $200 difference, the difference between 2500 and 2300, by taking it out of other program limits?

MR. BLUMSTEIN: How do we get to 2300, your HOnor?

THE COURT: I do recall Mr. Nathan saying that CBS would attempt to push the amount spent on music still further down.

MR. HRUSKA: That's right. I asked him to assume

for the moment, to call it $200. We started with a budget of 3,000. Mr. Nathan testified he believes the music can come in for around 2500. We are calling it 2500. Mr. Nathan has testified that he believes CBS would get the budget below the 2500. So we are calling that budget 2300.

The question is, does Mr. Nathan believe--

THE COURT: Where is the 200 coming from?

MR. BRUSH: Right.

A I may just introduce this by saying this is one of the problems we economists, all things being equal. They aren't always equal. We said before that I agree with you before that that 2300 represented a bargain market value, namely bargaining between the producer as the purchaser of the service and the copyright owner as the seller of the service.

In my judgment it is going to be a very hard bargaining, and if CBN gives to the producer 2300 to buy that music instead of 2500, that that producer is going to struggle and may succeed in making the 2300.

Now, if you say to me, now he is paying 2300 which had a market value of 25, I must disagree with you.

I m saying now the market value as bargained is 2300. In essence, the price is what they bargained. No matter who gouges whose eyes out, if they arrive at 2300, one

can say this is the market price.

If he can't get the man down below 25, and he still wants him, he may have to make the costumes constantly, I don't know.

THE COURT: Couldn't he also take music of less quality?

THE WITNESS: He could take less music, less quality. He has a problem, too, as I said before, which I don't want to complicate, about his own participation in ASCAP which doesn't exist anymore.

Q He's also got a problem, doesn't he, about keeping the entertainment value of that program up to network quality?

A Yes, he has to try to get the last bit of quality out for the dollar he spent.

Q So that he could not take the money out of other program limits without impairing the program to the extent that the other limits are lessened in quality?

A To the extent, Mr. Hruska, that the monetary limit is the determining limit of quality and, in turn, rating, that's true. I keep reading in all these thoughts in the field how speculative it is. Apparently money doesn't always determine rating. You have problems of taste. There's a big risk involved here. But to the extent money is the determinant, he has a real problem.

Q Let's assume, now, Mr. Nathan, that the fair market value of the music in this direct licensing system is 2500 and the producer actually gets 2500.

Now, under the circumstances do you believe that any tradeoffs might occur between music and non-musical elements?

A Relative to what those trade offs would have been before. I mean relative--

Q Let's start with the proposition as to whether they would occur.

A Well, I perhaps was worrying about semantics yesterday and I said the question is whether it is trade offs or squeezes.

You know, as long as anybody has any amount of money and there are multiple purposes involved I guess you could call it always trade offs.

You can cut that music down from 3,000 to 2,000 in risk quality and figure if you put the 500 somewhere else, but I thought that Dr. Fischer was primarily indicating that this would permit more elbow room in trade offs and I don't think it permits more elbow room in trade offs.

Q Well, the producer is now getting, under my assumed set of facts, $500 more than he wouldin the present system. In the present system he only gets the $2,000.

A That's correct. He gets 500 more and he has to provide more service. He has to pay the fellow for the performance rights, where he didn't before.

Q But then would the same man with the same kind of music, his talents, and we are dealing with the situation where the market value of his talents are $2500 a program--

A This is what they bargained out.

Q The producer now perceives $500 more and if he is going to get the same man, he is going to pay that man $2500, right?

A Yes, but I--

Q He could get a different man as you emplied before?

A No, that wasn't my question. If I could just be sure I am clear.

Q Yes.

A You said that he is getting $500 more?

Q The producer physically perceives $500 more in cash.

A That's right.

Q Correct.

A That's correct, but I just say that he also has to perceive that he is now getting $500 more in cash but he is accepting an obligation which used to get a thousand dollars.

Q Well, all right. He is accepting an obligation for which the fair market value is $2500.

A Well, now we are going around as to what the fair amount--no. You see, what I am trying to get at, Mr. Bruska, is that this double business--that he previously got 2,000 in cash and he paid 2,000 in cash to the writer.

Now, it is true he has $500 more cash. He doesn't have 2,000, he has got 2500 but now for the 2500 he can't say "That 500 now gives me a bigger latitude of choice."

Q I am not implying that.

A Beg your pardon.

Q All I want you to say, I want you to agree with, if you can, is that he now has $2500 in hand which is $500 more in cash than he used to get.

With that $2500 he can, if he wants, obtain the same writer to write the same kind of music out of his talents, the fair market value of that in this system is $2500?

A Yes, the fair market value being what he is able to bargain with this man, yes, sir.

Q Do you also agree, sir, that in lieu of making that decision, he could decide to take a little more chance on a writer of somewhat less experience, perhaps pay him something as low as $1800 and use that $700 to buy scenery, costumes or other program elements?

A Well, it is a real risk because we have already agreed that we have bargained this writer down from 3,000 to 2500 and now you are saying maybe he can get somebody else for 18.

If he can, and the risk is not too great, God bless him. That's good economic effort.

Q Do you believe, Mr. Nathan, that a system of price competition should prevail with respect to music rights even though in the competitive, economic environment there would be no guarantee of financial success to writers and publishers?

A If it is a workable system, I certainly do agree. I don't think guarantees of success ought to be given anywhere.

Q You talked before about producer-owned publishing companies?

A Yes, sir.

Q Which have deposited in their catalogues certain rights to music written by composers who write music for their programs?

A Yes, sir.

Q Do you know of any purposeful economic function served by a publishing company of that nature other than to receive ASCAP distributions? The publisher half of the ASCAP

distributions.

A I don't know enough about the details of that person but I would hope that he would try to maximize his revenues even in background music. As you said earlier, Mr. Hruska, not all background music is written by and for that program and it is used elsewhere and I would hope that that publisher would exercise his utmost capacity in trying to promote, market, exploit that music as other publishers would.

Q Do you believe that the kind of publisher we are talking about, the one owned by the independent producer of the television program, that that publisher is likely to own a copyright on a standard composition?

A He might. To the extent he doesn't, he would be a pretty small publisher.

Q You don t know about that?

A I don't, no.

Q Let me describe a set of facts to you and ask for your economic conclusion about them. Let's assume that the producer of a television program owned a publishing company.

The only music in the catalogue of that company consists of theme and background music written for programs. There had never been any commercial records, phonograph

records made of that music, it was sheet music, it was music on the sheaf.

Have you ever heard of the term, music on the sheaf?

A Yes, sure.

Q And this publisher from time to time received distributions from ASCAP when that music was played on a program.

Now, is that publisher, the publisher of the description, serving a useful economic function or does that situation represent unnecessary overhead?

A Again, in economic terms I would describe this as a man who is getting an extra reward for success in it, his product, namely, the whole program, not just the music and since it is at least related to his success in putting that program together and getting it on the air, if there is not much service, it is much better that he get paid for that than some publisher who doesn't do anything at all except gets it, you know, because there is a provision for publishers to be paid.

So maybe he doesn't do an extra service but at least it is part of his compensation for succeeding in getting a program established and continuing and if he, by his success in putting that program and having it run a long time,

he gets a large amount or a substantial amount for his music publishing function, whatever you want to call it, I suspect it is a reward associated with the success of his whole product.

Q You don't regard this as an aberation, an economic aberation?

A Oh, we have some aberations, Mr. Hruska, in our system, where people get windfalls.

You know, you might say, we have lots of payments in our economy that are not really associated. They are associated with custom, they are associated with the general common practice.

We have in our system--for instance, there are many companies that pay commissions to agencies or brokers around the country who just don't have anything to do with the transaction. The buyer goes right to the plant and they talk to him and the order comes and this broker, who never left his golf club, will get a big check and say "Here's your commission because it is your territory."

This happens all the time.

Q I just have a couple of more questions to ask on the bypass area.

Incidentally, are you aware of the fact, Mr. Nathan, that when ASCAP member licenses directly, the member

does not receive any distributions from ASCAP with respect to that directly licensed use?

A That's correct. I understand he doesn't get anything out of ASCAP for that direct license or that use.

Q In a bypass, CTN drops its ASCAP-BMI license and the other networks retain their ASCAP and BMI licenses.

Right off the bat we have got a clean slate in terms of price, don't we? There has never been any --

A Direct license price, yes, sir.

Q Right. We don't know what it is; people are not used to quoting prices or there is no bid and ask pattern developed.

Wouldn't this create, in your mind, a chaotic economic condition?

A Well, I can't believe that CTN would wait until the literal terminal date of the license to start, you know, negotiating and advertising and calling for li[illegible] and things of this nature, but as of the day it starts that, it would be new and there would be a lot of confusion and questions, yes.

Q Isn't that going to retard the speed with which deals can be made?

A Sure. I think that is why -- that is why I think that the Columbia Television Network would want to start its negotiations well in advance of the termination of the blanket license.

THE COURT: Are you saying, Mr. Nathan , to get some perspective on this -- that for example CTN might decide

six months or one year before the conclusion or expiration of this license that it was going on, makes the announcement that you said with due ceremony and pomp and then starts at the time to negotiate with people for what they would charge for their music, is that right, starting January 1, 1975 or whenever it would be?

THE WITNESS: That's correct, sir.

Q And without knowing the use to which the music will be put?

A That's right. They would start undertaking the negotiations. As a matter of fact, they might, well, negotiate in principle, and say that we are prepared to pay certain amounts.

I think on the overwhelming part of the CTN's negotiations, I think they would bargain with their writers without knowing what -- after all they bargain today on salaries without knowing what the music is and, since the major portion of it, certainly of the instances has to do with theme and background, I think that could be arranged in advance.

Q Let's assume at this time the ASCAP distribution rate for feature music is $300 and lower fees for other categories.

Do you think those fees would have any influence

on prices arrived at, prices offered by publishers?

A Oh, I think it would be one factor. If I were a publisher and you represented producers of Columbia Television andyou came to me, I think I would start putting numbers down and say, how much hage I gotten in the past, try to figure out that average and think of something and then I think I would certainly use that as one of my factors in considering the bargaining price; one factor.

Q Do you agree that price competition between sellers occurs when the offer of a lower price by one seller bids business away from another seller?

A Yes, I think that is -- assuming the same commodity and the same service. Yes, the reduction of a price by sellers selling reasonably identical products or services will tend to bid business away from the other seller if it is pretty much the same product, same service, yes.

Q You mean reasonably identical or reasonably interchangeable?

A Reasonably interchangeable, yes.

Q Now, in the present system, can BMI bid television network business away from ASCAP by lowering the price of its blanket license?

A Well, if it were a network executive, I would regard that as a bidding matter for BMI. If they gave me

likely to defer for some period of time use on another television network.

A Yes, sir.

Q Now, in the circumstances which there were 15 television networks and the producer of the CTN program approached, let's say, Mr. Chiantia for a license to use the song on a CTN program, isn't it reasonable to assume that Mr. Chiantia could say to himself, if I license CTN I may lose those other 14 networks for some period of time, whereas if I don't license CTN I've got a very good chance that one of those 14 networks is going to be using my song over the next couple of months, and isn't that chance a lot greater for Mr. Chiantia in the case where there are 15 television networks than it would be in the case where there are only three?

A That's quite true, but then--you see, immediately, and this is one of the troubles I have with these assumptions--immediately I come up with the question, are you then assuming that Columbia Television Network is much like, equal to, about the same size, pays about the same price on these direct licensing and they would get to each and every one of the other 14?

If that were true, I think your observation makes a great deal of sense.

If CTN happened to have the top strength and were a major force, it would pay more and, by the way, I think with 14 the incentive that CTN could offer in terms of price to attract people on direct licensing which could be a lot less.

That's another thing. If you had 14--the price situation would change rather considerably with 14 users of music versus three.

Q Have you studied the economic effects on television network when the programs on its current schedule undergo a higher than normal rate of failure?

THE COURT: Would you repeat that, please.

(Question read.)

THE COURT: Do you understand the term higher than normal rate of failure?

THE WITNESS: Yes, I understand it.

A I have not made such a study as to what happens when a lot of the programs prove to be failures, whether it looks,--whether they lose the rest of the audience. I haven't made a study of that.

Q All right.

A I beg your pardon. When they lose their audience for other programs. I didn't mean the rest of the audience. I have not made such a study.

proposition.

Is there one?

MR. TOPKIS: Well, yes. I hadn't been aware that we were litigating that question. If we were to, I suspect very strongly that we would suggest the total dispensability of BMI.

THE COURT: Well, that is fine. I wouldn't say it is being litigated in the sense that it is an issue in the case, but it may be a factor that has some relevance at some point.

MR. TOPKIS: We haven't addressed ourselves to it and don't propose to, unless you desire us to.

THE COURT: I am not asking you to now.

MR. HRUSKA: We have been addressing ourselves to this question for three and a half years. This happens to be one of the central features of the Section II point. The fact of monopolization in this case stems precisely from the proposition that a television network cannot get along on its own with just an ASCAP license or just a BMI license. It couldn't forego the ASCAP license and use BMI.

THE COURT: I understand your position. I don't know whether you meant to attach any significance to the words on its own. You mean if all networks did the same thing maybe they could get along; if one of them alone could not get along --

MR. BRUSKA: That's right. For example, if there were an injunction issued in this case prohibiting ASCAP and BMI from licensing television networks, then we believe the networks could get along.

THE COURT: All right.

Can you read back the last question and Mr. Nathan's answer to that question.

(Question and answer read.)

THE COURT: Thank you.

Q Mr. Nathan, do you believe from the standpoint of a television network there is reasonable interchangeability between an ASCAP blanket license on the one hand and a BMI blanket license on the other hand?

A As alternatives?

Q Yes.

A I really don't feel competent to observe that. I just think -- it seems to me both are needed. If you say to me could they economically function with one or the

other as alternatives, I hesitate to say it. I think there are so many other elements than just economics involved. I don't think my answer would be very meaningful.

MR. HRUSKA: Your Honor, I wonder whether we could have our afternoon break at this point so I can consult with my associates and perhaps wrap this up very quickly.

THE COURT: If you think that may save time, I would be glad to do it.

MR. HRUSKA: I think it would, your Honor.

(Recess.)

MR. HRUSKA: Your Honor, we have no further cross-examination of Mr. Nathan.

MR. BLUMSTEIN: No redirect, your Honor.

THE COURT: Thank you, Mr. Nathan. It was extremely interesting to hear your voice.

(Witness excused.)

THE COURT: We will be hearing you some further on this chart business.

MR. BAKER: That is what this pertains to. In order to avoid any delay next week, I would like to put my friends on notice, I don't believe Mr. Nathan can quality some of these documents and it will probably be necessary for them to call the people who prepared them and to

provide the business records fromwhich they came.

MR. BLUMSTEIN: May I suggest we discuss that perhaps at the end of today's session.

THE COURT: Very good.

MR. TOPKIS: We would like to recall Mr. Paul Marks, who I believe has already been sworn.

P A U L M A R K S, resumed.

THE COURT: Be seated, Mr. Marks. I recall you have been sworn.

DIRECT EXAMINATION CONTINUED

BY MR. TOPKIS:

Q Mr. Marks, I'm just going to direct your attention to a few remarks which Miss Marion Preston made when she was testifying before this court last week.

I take it by way of preliminary you have read Miss Preston's testimony?

A Yes, I have.

Q Do you recall that she testified that she met with you on September 12, 1967? Do you remember readint that testimony?

A Yes, I do.

Q Does that accord with your recollection? Namely, do you have a recollection of having met with her on that day?

A I recall meeting with Miss Preston. I cannot say that I recall the exact day or even the year, but I did meet with Miss Preston at about that time. I recall that.

Q Did you have a discussion somewhat resembling that which she described?

A Yes, we did. We discussed performing rights in jingles and how they are licensed directly and how they might be reserved for licensing through the society.

Q Did you say anything to her about the right of members to license directly?

A Yes. That was what brought about the meeting and what usually brought about these conversations with members who wrote jingles and were people from agencies, the fact that members can and do license the performance of those jingles directly and that, therefore, the society doesn't pay them on those performances that are licensed directly.

The meeting would come about because the member, in this case Stan Appelbaum, would be interested in knowing how he might obtain royalties from ASCAP by reserving his performing rights.

MR. TOPKIS: Your Honor, since I am going to attack Miss Preston's not so much version as understanding of what was said on that occasion and since she did prepare a reasonably contemporaneous memorandum written five days later and since Mr. Hruska offered it subject to my possible objection, I will now state that I don't see that my objection

would be very tenable, and so I will consent to its admission as PX 915.

THE COURT: All right.

(PX 915 for identification received in evidence.)

THE COURT: Have you seen this memorandum before, Mr. Marks?

THE WITNESS: I have seen it before, your Honor. I would appreciate being able to read it again.

THE COURT: All right.

(Pause.)

Q Mr. Marks, you see that the last two paragraphs on the first page of PX 915 set forth what Miss Preston conceived to be two alternatives which J. Walter Thompson could follow.

Do you see that, sir?

A Yes, I do.

Q The question I would put to you, Mr. Marks, is: Does there state the two alternatives accurately and, if not is there anything in particular in which she does not state them accurately?

A Well, she does not state them accurately in this respect. She talks about either the member directly licensing them to the agency, that is, the agency retaining the copyright and all rights, or giving Stan the right to

collect his performance rights from ASCAP.

Now, assuming that means giving Appelbaum the performing rights--she says that in the latter case this would mean that we, probably Thompson and the agency, could only play the theme or the jingle on ASCAP licensed stations.

Now, the part of that that is incorrect is that with regard to non-ASCAP licensed stations, of course, the member still retains the right to license the user, Thompson, directly.

In the absence of such a direct license, if Appelbaum has the performing rights, then the agency could not authorize performance on a non-ASCAP license station. But if Appelbaum has the performing rights, he still subsequently retains the right to license the agency directly for performance on a non-ASCAP licensed station.

Apparently that is what is not included in the memo.

Q When she says, "This would mean we could only play the theme on ASCAP licensed stations" that statement is inaccurate?

A It is accurate in the absence of a direct license from Appelbaum to the agency or to the station, but it does not point out that very important fact that the member retains the right to license the station or the agency directly.

THE COURT: So that what you are saying is that at least between JWT and Appelbaum, they would control the situation which you felt was barred?

A That's correct, your Honor, because if JWT were the publisher, the publisher could license directly as a member as well.

Q This was before JWT music was formed, before it was--

A I think they were talking about Todd.

THE COURT: I didn't mean JWT but whoever "we" was, the "we" of this letter, together with Appelbaum, could do what "we" wanted if Appelbaum consented.

A That's correct, your Honor.

Q Now, at page 3383, Miss Preston was asked this question and gave this answer under questioning by Mr. Hruska.

"Let me ask you what in substance was said at the meeting with Mr. Marks by Mr. Marks and by you."

And she answered, "In substance, we had two choices, either Stan Appelbaum and Todd Music Company forgoing ASCAP royalty for advertising use of his composition and at the same time receive ASCAP royalties for the pop use of his composition or they could receive their ASCAP royalty and we would be limited to use of his composition on ASCAP

licensed stations only. Inasmuch as this was a theme to be used by the client in question, we chose the former alternative."

That's the end of the answer.

Do I gather, Mr. Marks, that according to your understanding, Miss Preston there repeated the misunderstanding that you have just described to his Honor?

MR. KUSHA: I object, your Honor. It is a leading question.

MR. MARKS: Of course it is.

THE COURT: Let me put it this way, Mr. Marks--is that statement of Miss Preston's a correct statement of the information she was given by you at the meeting that she had with you?

THE WITNESS: Your Honor, that statement has the same problems in it that the memo does, that it does not point out that Rapelbaum, the member, retained the right to license unlicensed stations directly or to license the agency directly to license the unlicensed station.

THE COURT: So, to that extent it is incorrect?

THE WITNESS: That's correct.

Q Now, Mr. Marks, over on the next page, 3384, Miss Preston was asked this question and gave this answer at lines 12:

"Question. Did Mr. Marks say anything further on that subject?

"Answer. Well, he said that if music publishers and composers would directly license non-ASCAP stations, that it would beat the very structure, the very concept of ASCAP."

MR. HRUSKA: Excuse me. I think the word "beat" there is a typographical error. The word was "defeat."

MR. TOPKIS: I agree with you, so shall we all change our transcripts.

MR. HRUSKA: Fine.

Q Now, Mr. Marks, did you say those words or anything like them?

A No, I did not say that. What Miss Preston might have understood me to say was that you can't have it both ways.

You can't--a member can't license the performance directly and then expect ASCAP to pay royalties to the member for that performance; that that would beat, or defeat or whatever word you want to use, the structure.

Q Now, at 1390, Miss Preston was asked about a conversation that she had in 1969 with Mr. Paul Adler of ASCAP.

Do I understand that in 1969 Mr. Adler was your subordinate?

A That's correct.

Q At the top of the page:

"Question. Before you give that, will you tell me how the subject arose at all?

"Answer. Yes. JWT Music, Inc., as a subsidiary of the J. Walter Thompson Company," and I will interpolate if I may the fact that as of that time JWT Music, Inc., either was or was about to become a member of ASCAP -- "JWT Music, Inc. as a subsidiary of the J. Walter Thompson Company could not put our clients in a disadvantageous position by reason of having publishing rights of any of the compositions owned by our clients.

Therefore, we wanted to be very sure that we were not limited in any way in the use of this music over radio and television stations."

And his Honor said, "And you expressed that to Mr. Adler?"

And the witness said, "Oh, definitely expressed that to Mr. Adler and we had to work out an arrangement whereby our clients would have exactly the same rights with the JWT Music, Inc., Publishing Company in the picture as they had previously"--that is, when they were not a member of ASCAP.

"The essence of our conversation was that ASCAP was not desirous of our, JWT Music, Inc., licensing directly

the use of any music in our catalogue on non-ASCAP licensed stations and, therefore, the conclusion reached at that meeting was that JWT Music would forego any royalties with respect to use of music on local stations but we would receive the full royalties which ASCAP pays for commercial use of music that was used on network broadcasting."

Now, my question to you is, to the degree that Miss Preston purports to be quoting your subordinate, Mr. Adler, when she says that ASCAP was not desirous of our, JWT Music, Inc., licensing directly the use of any music in our catalogue on non-ASCAP licensed stations, if Mr. Adler said that or anything like it, did he do so pursuant to authorization from you or not?

A No. It certainly was not something that was authorized by me and I don't believe he said it and I know he didn't say it.

Q What is the basis of our conviction, sir?

THE COURT: I really don't see how you can say that unless you were there. I don't doubt that is your conclusion but what exception is that to the hearsay rule?

MR. TOPKIS: I think your Honor the best one. The fast answer exception.

THE COURT: I don't know how Mr. Marks remembers the rules of evidence but I am afraid unless you were there

or unless you talked about that with Mr. Adler in Miss Preston's presence or something of that sort. But I just can't take your view. That you didn't authorize it you are perfectly competent to testify to.

A Might I also testify as to why I don't believe it was said, your Honor.

THE COURT: If Mr. Hruska is willing.

MR. HRUSKA: No, your Honor.

MR. TOPKIS: Well, your Honor is as familiar, surely--

THE COURT: I think Mr. Topkis will be in a pretty good position to argue why it is not a very credible statement but--

MR. TOPKIS: Well, I think Mr. Marks has within his knowledge a bit of evidence which is inadmissible, namely, the arrangement which was actually made, which will bear upon this.

THE COURT: You can certainly put that in.

MR. HRUSKA: That is different.

MR. TOPKIS: Could he tell your Honor, then, why he is so sure, subject to a motion to strike?

THE COURT: No. You made it clear that you are going to argue that thenature of the arrangement in itself was such that Mr. Adler wouldn't have said this and then

reached the arrangement that he did--Mr. Marks or somebody else, perhaps.

MR. TOPKIS: I think that is true--

THE COURT: I am willing to hear what the nature of the arrangement consummated was.

Q What was the deal that was made with JWT Music?

A Well, I wouldn't express it as a deal. The arrangement was that if they chose to reserve the rights as to network performances--that is, themember, if the member chose to reserve the rights as to network performances but leave with the agencies the rights--

Q When you say reserve, do you mean have ASCAP license the network performances?

A That's right. Reserve to the member for licensing through ASCAP. Sorry.

Q All right.

A But leave with the agencies the rights as to local performance, that we would accept that for licensing the networks through the society.

In other words, we were being accommodating at that point, rather than saying to them, no, no, you have got tolicense everything through the society.

It is just the opposite--in other words, the end result is the opposite of what her, the beginning of her

statement is.

Q So the end result was that ASCAP would license the networks and JWT Music, Inc., would license the local stations; is that right?

A That's correct. If the member, if the member in the particular case reserved to himself the licensing through ASCAP the network price and not the local rights.

THE COURT: I understand why youused the phrase, the words, 'the member," the actor, but wasn't JWT the member in this case?

Q I take it there were two, really, the JWT and the composer, is that right, Mr. Marks?

THE WITNESS: Yes, your Honor. JWT was the member as of '70. I don't remember the date of this conversation.

MR. HRUSKA: As Mr. Topkis pointed out before, I think accurately on the record, based on the record, the contemplation at this point in time was that JWT Music, Inc. would become a member of ASCAP and the arrangements were being worked on and were looking forward to that objective.

THE COURT: All right. Thank you.

And that arrangement as you recall it, was that actually followed up thereafter?

THE WITNESS: Yes, your Honor. There is -- there are -- there is at least one agreement that I have seen where that differentiation is made.

THE COURT: One what?

THE WITNESS: One agreement between the agency and the member where that differentiation is made; that is, between network rights and local, but there are other agreements made by JWT the publisher, with JWT the agency, where there is a restriction simply of all rights so that

apparently they chose -- it was followed in one case and not in another.

THE COURT: Am I to understand, Mr. Marks, that in presenting such an arrangement, whether it was Mr. Adler, as apparently it was, or whether you might have made the same presentation, that this was merely an articulation of the options open to any member?

THE WITNESS: To any member, yes, your Honor.

THE COURT: There was nothing special about it?

THE WITNESS: That's right.

THE COURT: You are explaining how it worked?

THE WITNESS: That's correct, your Honor. It may have been special to the extent that this might have been the first time that it arose. I had not heard of that request from a member before that time, but it certainly would apply to anyone.

THE COURT: Was the explanation of how you or your staff under your rules to operate to a set of facts presented to you for the first time?

THE WITNESS: That's correct.

Q And actually, Mr. Marks, JWT Music was the first advertising agency-owned publisher member of ASCAP, is that right?

A As far as I can recall, Mr. Topkis. I don't know that there might have been others -- first, the first one that came to my attention.

Q Are there any others today to your knowledge?

A I don't know.

MR. TOPKIS: Mr. Marks, I have nothing further. Thank you very much.

You may inquire.

MR. BRUSKA: May I inquire to the Court whether BMI has any questions?

MISS MEARSE: No questions.

CROSS-EXAMINATION

BY MR. BRUSKA:

Q Mr. Marks, was it your understanding -- which was your understanding of the situation -- one, that JWT wanted to retain the right to license all television stations or --

THE COURT: Directly?

MR. BRUSKA: Yes, your Honor, directly.

Q Or, (2), that JWT wanted to retain the right to license those stations which had no ASCAP license?

MR. TOPKIS: Wait. Which conversation are we talking about?

MR. BRUSKA: The understanding of the arrangement made in 1960, your Honor, which was the last subject of direct examination.

MR. TOPKIS: That is the meeting that Mr. Marks did not attend.

MR. BRUSKA: But he has testified about the arrangement made with JWT.

MR. TOPKIS: Right, but he is not, then, I should think, competent to testify as to what JWT wanted.

MR. BRUSKA: That was not the question, your Honor. The question was his understanding, which is a subject as to which he just gave some testimony.

THE COURT: I think the question is proper.

We are only talking about your understanding because we know you weren't there.

THE WITNESS: Right, your Honor.

First of all, I am not clear as to which JWT you mean -- the agency or the publisher, but let me say that my understanding comes in large part from the results of that conversation. I don't know what Marion Preston or somebody else at JWT had in mind about what they wanted.

I know that in other conversations, in speaking with agencies and speaking with Marion Preston, they were concerned that they would be able to have stations play

their jingles or commercial messages without any problems interfering with that, in the way of that performance.

Q Do you know why J. Walter Thompson formed a music publishing subsidiary?

THE COURT: You mean did they tell him why or what?

MR. HRUSKA: Does Mr. Marks have any reason to know the reasons why they formed the company.

THE WITNESS: No, I don't know -- I can speculate as to why they might have formed such a company but I don't know what was their inner thinking on that.

Q Is it reasonable to conclude, do you think, that the reason that they formed that company was to receive ASCAP distributions in respect of use of music on JWT commercials?

A I think that it is not reasonable to assume that that was their preeminent reason. The amounts are so small, compared to what an agency like JWT receives in payment from stations and networks for their performance -- you know, we are talking about millions and millions as compared to a few thousand dollars from ASCAP, that I can't see that it would be reasonable for that to be the preeminent reason.

I can see that perhaps they wanted the ability to have ready control of the rights in the work and at the same time perhaps assuage the writer who is interested in

getting whatever small amounts he can for the performance of his music.

Q How do they get the greater control over the rights by becoming ASCAP members?

A Well, remember, there is two parts to what I said.

Q I know. I am focusing on just one. You said that you thought a reason might be for JWT to get greater control over the music and I would like to know how greater control flows from ASCAP members?

A Yes. You can't split my answer, Mr. Hruska. It is there -- getting greater control at the same time they are assuaging the writer. They are saying to the writer, look, we are helping you. They are getting the control as a member of ASCAP. They have the right to directly license, so that if, let's say take the example of Stan Appelbaum, who is the reason, as the member for this meeting in '67.

Stan Appelbaum had his own publishing company, Todd Music, and still does and if the rights are reserved for licensing through ASCAP by Appelbaum and Todd, that gives JWT less control than if the rights are reserved by Appelbaum and JWT to publish and --

Q You mean the circumstances in which JWT is not a member of ASCAP, the sponsor of the program, neither

the sponsor of the program nor JWT would have the right to license a television user? Is that what you mean?

A No. I mean that in the absence of a direct license from the member, if the member reserved all the performing right for licensing through ASCAP, in the absence of that direct license from the member, they would not have the right to license the station.

Q That would be true of music used on the commercials, JWT commercials?

A That is correct.

Q Now, can you think of any conceivable reason why JWT would want to retain the right to license television stations which held ASCAP licenses?

A Yes.

Q Could you tell us those reasons?

A Yes. I think that the agencies were concerned with a station in the future, perhaps not holding an ASCAP license. Any number of times it was said to me by --

Q I am afraid you misunderstood the question.

The question had not to do with stations which now hold ASCAP licenses and in the future don't hold ASCAP licenses.

My question really was limited to any reasons why JWT would want to retain the right to license stations

which at any given point in time had an ASCAP license.

A Yes. I don't think I misunderstood your question. What I was explaining was that agencies had the feeling, and JWT as well, that at some future point in time, it was possible that a station would not have an ASCAP license and as a matter of fact any number of times they would refer back to the point in '40 when the stations took ASCAP music off the air and they would say, we don't want to be in a position where a station could not perform our jingle because they took ASCAP music off the air.

Q Mr. Marks, would you have worked out an arrangement if it had been JWT's desire to do so in which JWT retained the right to license only in these circumstances, the circumstances being it could license a station only at a point in time when that station had no ASCAP license, if that station had an ASCAP license, it, JWT, could not license that station?

A Let me see if I understand that, Mr. Hruska. Are you saying that --

THE COURT: Whether you understood it or not, I was waiting for Mr. Topkis to object, but he is getting too old or too tired.

MR. TOPKIS: Worn down, your Honor.

THE COURT: I really think that the answer to such a hypothetical question wouldn't be very meaningfull. It just didn't happen, what we are talking about. I don't think it means much for Mr. Marks to tell me yes or no.

MR. HRUSKA: I think in essence that is precisely what happened. I think what occurred in this situation --

THE COURT: You are free to argue that, Mr. Hruska.

MR. HRUSKA: I know that, your Honor. The

argument on that point is now going to be based on what amounts to a very sharp conflict in testimony. Mr. Marks has said that Miss Preston is confused about the situation. He has not said Miss Preston has made it up, Miss Preston committed a falsehood on the stand. He said she was confused.

He has pointed out an explanation for that confusion. I don't think the explanation is a good explanation.

I would like to point out through cross-examination why it is not a good explanation and why Miss Preston's version of the facts not only is not confused but is perfectly accurate. That is what I am in the process of doing, simply by attempting to elicit it through Mr. Marks these points, that the interests of the --

THE COURT: Go ahead and ask the question.

Will you read back the question, please.

(Question read.)

A You mean an agreement between the agency and the writer that gave the agency the blanket right to license any station that was unlicensed by ASCAP at any time?

Q Yes.

A We would not agree to -- that this was a reserva-

tion of rights by a member of the licensing through ASCAP, because here again you can't have it both ways. If you are saying to the agency, you give me the rights only where the station --

Q You say if you say to the agency. Who is --

A The member. If the member said: Let me have the rights only for stations which are covered by an ASCAP license, but if all the stations in the future or any station in the future or group of stations on a blanket basis decide not to hold the license, then the agency has the right to license those stations regardless of what or who or when they are unlicensed, then that is having it both ways.

That is licensing directly and also trying to obtain royalties through the Society.

Q When a station does not have an ASCAP license, are uses of ASCAP music made by that station uses in respect of which distributions are made by ASCAP to the members in interest; that is the members who own the songs comprising the uses?

A I don't understand that that was a question. I think it is a statement.

Q No, it is a question.

A Can I have it read then?

(Question read.)

A You mean may a member be paid royalties on the basis of performances on a station which doesn't currently hold an ASCAP license?

Q Right.

A That may happen because the frame from which the sample is chosen has to be constructed at a different point in time than the actual performances come into the sample.

So that a station may pay the Society royalties in one year and not have a license in a subsequent year and still there may be performances in the survey because the survey is based on that frame from the prior year. That may happen.

Q How often does that happen, Mr. Marks?

A I don't know.

Q Would you say it is about a one in a million shot?

A No, I wouldn't.

MR. TOPKIS: Just to avoid difficulty, we will stipulate it is relatively rare.

THE WITNESS: Certainly.

Q You don't survey non-licensed stations, do you?

THE COURT: I take it that the example was that

the station was licensed at the time the survey was made, but by the time the payment is made it is no longer licensed.

THE WITNESS: That is correct, your Honor.

Q You don't know whether that has ever occurred, do you, Mr. Marks?

MR. TOPKIS: Isn't my stipulation sufficient, your Honor? Can't we go to something else?

THE COURT: Yes, I think it is sufficient. It is relatively rare.

THE WITNESS: It might occur.

Q When a station is unlicensed, that would be a station which you would not deliberately survey during its period of being without an ASCAP license?

A That is correct.

Q You said that if AWT, if I understood this correctly, retained the right to license a non ASCAP licensed station, that that would be having it both ways. In view of the fact that you do not survey and do not make distributions in respect of the uses made on that station, why is it having it both ways?

A Because, you know, when a member licenses a station directly, we ask that member -- we tell him that

he has to tell us what station he licensed and for what period.

So that we can tell what is and is not included in our license. So that if we are dealing with a station, we know what is and is not in our repertoire.

For JWT or any other member to provide that it could license all stations not licensed by the Society would not give us that kind of data on which we base our relationship with the stations. It would be an administrative difficulty of very large proportions if we didn't know what our members were licensing directly.

Q You know at any point in time, Mr. Marks, which stations have ASCAP licenses and which stations do not have ASCAP licenses, true?

A That is correct.

Q If JWT had the right to license only non-ASCAP license stations, you would be safe in your understanding that at any point in time any JWT music which your survey picked up on an ASCAP licensed station would be a use in respect of which you could make payments to JWT without concern that they were having it both ways, true?

MR. TOPKIS: Excuse me, Mr. Marks. Your Honor, I submit this is totally irrelevant to anything I

asked about and to any issue inthis litigation.

It seems to me we have enough problems without --

THE COURT: Mr. Hruska apparently is making this a matter of credibility.

MR. TOPKIS: Is that what it is?

THE COURT: I have thought earlier in the game that that is perhaps so. I will allow the answer to this question, but I think that we will then have come to the end of the testimony -- the persuadability of Mr. Marks' position.

Can you answer the last question?

THE WITNESS: Can we have it read back?

THE COURT: Yes.

(Question read.)

A Well, that -- you know, that harkens back to my original contention. It is a conclusion. My contention is that if the agency has the right -- merely leaves with the member the right to license all those stations that are licensing -- that have ASCAP licenses and retains the right to license all stations that don't have ASCAP licenses without enumerating what those stations are and what the period of those licenses are --

Q But you know who those stations are?

A How ---

THE COURT: I got from your earlier testimony that your point was that you didn't know what the arrangements were between the member and the non-licensed station unless they told you, is that correct?

THE WITNESS: That is correct, your Honor.

We know which stations are unlicensed by ASCAP. We don't know which stations are licensed directly unless we are told.

Q If the advertising agency only has the right to license those stations which are not licensed by ASCAP, then you would know that the only stations being licensed by the advertising agency--

THE COURT: That is a matter of argument. That is not the point I understood Mr. Marks to be making.

I understood for whatever reasons it is that ASCAP needs the information, they need the information only only about what stations are unlicensed and, therefore, the member might have the right to license, but also the information about whether they actually have licensed them and what the terms of those licenses are; is that correct?

THE WITNESS: Yes, your Honor.

Q Why do you need that?

A So that in dealing with unlicensed stations we know what it is we are selling to them, what our license contains.

Q When you deal with unlicensed stations, you say you have to know what direct licenses those unlicensed stations have obtained?

MR. TOPKIS: Objection. The witness was just asked and answered that question.

THE COURT: I think Mr. Hruska was recapitulating what he understood the witness to say.

MR. HRUSKA: Right.

THE COURT: Would you put the question, please?

Q If JWT had retained the right to license non-ASCAP licensed stations so that when you were dealing with such stations you would not know what arrangements had been made between such stations and JWT or, for that matter, between such stations and any other ASCAP member who was exercising his right of direct licensing in dealing with that station, is that the reason why you would not distribute monies to JWT in respect of uses on ASCAP licensed stations if JWT were to have retained the right to license non-ASCAP licensed stations?

THE COURT: I am afriad, Mr. Hruska, even if Mr. Marks understands that question, I don't. Therefore, I wouldn't understand what the answer to it meant.

Q Let's go back to 1967, that conversation with Miss Preston.

Di you or didn't you say to Miss Preston that if JWT wanted to retain the right to license non-ASCAP licensed stations, then Mr. Appelbaum could not receive ASCAP distributions in respect of commercial uses, that is in commercials, of that music on ASCAP licensed stations?

A I don't recall the specific language of the conversation.

Q Was that the substance?

A But if at that point Miss Preston said, well, we will have Stan reserve the rights for any station that is licensed by ASCAP but he has to give us the right to license any station which doesn't have an ASCAP license, then I would not have agreed that that was the kind of an arrangement whereby we would pay royalties for performances of that jingle.

Q Your reasoning on that proposition would be the same as your reasoning on the proposition we were discussing with respect to 1969 arrangement?

A My reasoning is that that was a grant to the agency to license directly and was a direct license to the agency for anything that was unlicensed by the society or became unlicensed by the society without enumerating the station or the period of the license or what was being licensed.

Q And you felt that way even though you had in hand in 1967 a list of all the stations that had not obtained ASCAP licenses?

A What we didn't have is a list of stations that the agency itself would be licensing, a list of stations of-- of ASCAP unlicensed stations, that is stations unlicensed for ASCAP, which doesn't tell us first of all what stations are going to be unlicensed in the future and, secondly, what

stations are going to be licensed by the agency for performances of this commercial for what period of time.

THE COURT: Mr. Marks, let me ask you this. I find this all alittle heady, I must say.

Supposing, and maybe it is an unrealistic assumption, that Miss Preston had said, either Stan Appelbaum or we, whoever it was would be the appropriate person, wants to let ASCAP license all performing rights for all the ASCAP licensed stations and we would like to license, whichever one of us is the right one to do it, ten given non-ASCAP licensed stations for two years and they are, A, B, C, D, E, F, and G--that is not quite ten--would that have been a possible arrangement? I am trying to isolate the effect, giving you the specific information about a proposed station and term of license and so forth would have.

THE WITNESS: Right, your Honor. I understand the question.

Let me state first that I don't recall any such arrangement being discussed or contemplated with JWT or any other agency.

THE COURT: I am trying to understand what your policy is.

THE WITNESS: Right. I do believe that that kind of thing would be acceptable, and we have--you know, I can

think of other instances where a member has notified us that he has licensed station such and such for a period of time for the specific composition and we have marked our record not to pay him on performances on that station, but we do pay him on other performances in the survey. So by reference I would say that, you know, we would do it with regard to jingles even though it hasn't come up in that context.

Q This occasion that you have just been discussing, a member advising you that he had licensed a particular station for use over a particular period of time, is that also an exceedingly rare occurrence, Mr. Marks?

A Well, I don't know what you mean by rare occurrence.

Q How often does it happen a year?

A With regard to the networks, there have been a number of occasions where the network log will come in marked PL, private lines.

We will write to the member and say: The network has advised us that there's been this performance, but it was licensed directly by you. Have you licensed it?

THE COURT: You mean they are already bypassing you?

MR. HRUSKA: We are talking about band leaders,

your Honor, and for the ball games and isolated occurrences.

THE COURT: I am sure there's some explanation.

THE WITNESS: I don't know who is testifying here. That's not what I was referring to necessarily.

THE COURT: What were you referring to?

THE WITNESS: Cases where the networks do purport to have a license directly from a member. It may be that the writer was unaffiliated at the time of the performance and the network will make him sign a document which gives away his performing rights before they will perform the thing for very little money, I might say, if anything.

MR. BRUSKA: I move to strike that testimony, your Honor, on the ground that the best evidence of it are the documents.

THE COURT: I will strike the part which refers to little money. I think Mr. Marks is perfectly competent to testify of instances that he knows.

Q Mr. Marks, if you are perfectly happy to give a member who makes direct licenses television stations distributions in respect of all uses other than those directly licensed uses, why weren't you perfectly willing to give JWT distributions in respect of uses by television stations other than uses made by non-ASCAP licensed stations?

A Mr. Bruska, I think I would be repeating myself.

I'm certainly willing to do so.

Q How do you reconcile the two?

A What I said was that the type of grant that the agency was looking for and does look for may be an overall grant of rights for any and all stations, at whatever point in time did not hold an ASCAP license. That I said was very different from a member advising us that certain specific stations, designated stations, are licensed directly for particular work or works for a particular period of time.

MR. HRUSKA: I have no further questions.

MR. TOPKIS: I have no redirect.

THE COURT: Thank you, Mr. Marks.

(Witness excused.)

MR. TOPKIS: Your Honor, with the exception of Mr. Aaron Ruben, whom we have scheduled for Tuesday morning, that concludes our live witnesses. Of course, the resumption of Mr. Nathan.

THE COURT: We have no trial tomorrow. Very good. I will see you at 10 o'clock on Tuesday morning.

(Adjourned to December 11, 1973 at 10 o'clock a.m.)

December 6, 1973 4241- 1

4082	23	better	bitter
4083	13	process.	process,
4083	14	To	to
4084	12	ASCAP	CBS
4084	6, 19, 23	effect	affect
4085	14	elevation	evaluation
4088	2	bu	but
4088	5	inthe	in the
4088	11	occasion	occasions
4088	12	is considerable	is a considerable
4088	16	can	cannot
4090	2	MR.	Mr.
4090	15	cirrect	correct
4091	3	ofmusic	of music
4091	7	Christmastime	Christmas time
4091	14	influen e	influence,
4092	14	wasn t	w sn't
4093	12	and alike	and the like,
4094	21	and	on
4095	3	hehas	he has
4097	14	union certified	board-certified
4098	16	wereonly	were only
4099	22	competitivity	competitive
4099	24	orlower	or lower

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PAGE	LINE	ERROR	CHANGE TO
4101	2	New	How
4101	4	there are	there is
4101	20	implying	inclined
4102	22	licensing and they would get to	licenses than they could get on
4103	10	on	on a
4104	16	CBX	CBS
4104	21	are	care
4104	23	woudl,	would,
4105	2	100,000	$100,000
4105	18	quite a	quite such a
4106	6	affect	effect
4106	18	intentions	intention
4107	18	there	their
4109	13	foos	fools
4110	4	or	are
4110	6	concentrated	concentration
4110	17	Ithink	I think
4111	4	simplier	simpler
4111	19	creditx	credits
4111	25	even	event
4113	21	a manageable	the manageability
4115	6	half	have
4115	7	not.	not?

4241- 3

PAGE	LINE	ERROR	CHANGE TO
4115	18	no	know
4116	24	decibals	decibels
4117	8	me to whomdid	me, to whom
4117	16	posted	posed
4117	19	CTN	3M
4118	11	your	the
4119	19	-ore	more
4120	3	ingenius	ingenious
4120	18	Transactions	Transactional
4121	12	thinkit	think it
4124	8	publishers	publisher's
4124	18	continuationof	continuation of
4125	11	to NBC	to the NBC
4125	12	CBS	ABC
4125	13	writer, member	writer member
4125	14	to gain the	to, again, the
4126	7	Networks,	Network,
4126	19	thinkthis	think this
4127	5	right s	rights
4127	16	can 't	can't
4130	18	A form	"A form
4131	4	posibion	position
4132	6	say	saw

4241- 4

PAGE	LINE	ERROR	CHANGE TO
4132	16	than, of	than of
4132	17	printings	premiums
4133	14	in continuity and	and continuity of
4134	15	range.	range is.
4134	22	what	"What
4138	15	its	it's
4138	17	pertinents	pertinent facts,
4139	11	and likekly	and is likely
4140	21	ore	more
4141	6	CTB	CTN
4141	11	questionfor	question for
4145	8	Beetles	Beatles
4145	22	withdrawl	withdrawal
4145	24	with	would
4147	2	Hammersteins	Hammerstein
4147	3	Beetles	Beatles
4148	6	isyour	is your
4149	4	iqterim	interim
4149	11	thinkhe	think he
4151	6	battled	battle
4151	9	having a direct	having direct
4153	4	groups'	group's
4153	16	withun	within

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PAGE	LINE	ERROR	CHANGE TO
4154	20	on	to
4154	21	wants	starts
4154	23	roomfor	room for
4156	19	music of	music is of
4156	23	and they	and they'd
4156	24	t-	to
4156	24	tried t-	try to
4157	25	inthe	in the
4160	2	IrvingBerlin	Irving Berlin
4160	2	IrvingBerlin	Irving Berlin
4160	2	arch type	archetype
4160	4	Mr.Berlin's	Mr. Berlin's
4160	22	beenfully	been fully
4161	2	sime	same
4163	6	ste	set
4163	8	statute	stature
4163	19	contract	a network
4164	25	verybody	everybody
4167	12, 13	maybe	may be
4167	14	recordkeeping	record keeping
4169	16	much to	much too
4172	24	THECOURT:	THE COURT:
4173	2	any	"Any

4241- 6

PAGE	LINE	ERROR	CHANGE TO
4173	4	licensing,	licensing
4173	5	toire,	toire.
4173	6	ceiling	ceiling,
4173	7	there.	there."
4174	19	I	it
4174	22	positionbetween	position between
4175	11	but certainly it	that certainly
4175	13	what would	what he would
4175	13	be	if it were
4175	13	repertoire	repertoire,
4175	14	conclusion, it	that
4175	20	anoher	another
4176	19	andawfully	and awfully
4177	19	hejust	he just
4182	5	in a	in
4182	17, 25	reverent	referent
4185	5	set	sets
4185	24	in balance	imbalance
4186	10	to	(delete)
4186	12	dontknow	don't know
4186	22	mistake in	mistaken
4187	14	producers	producer
4187	18	maybe	may be

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PAGE	LINE	ERROR	CHANGE TO
4187	25	todays	today's
4188	24	2300	2500
4189	21	HOnor?	Honor?
4190	8	Where is the 200 coming from?	There is where the 200 is coming from?
4190	11	economists, all	economists have, all
4190	12	agree	agreed
4190	13	bargain	bargained
4191	4	to make the	to take from the
4191	18	limits	elements
4192	19	in	and
4192	20	Fischer	Fisher
4192	24	wouldin	would in
4193	7	are	is
4193	13	emplied	implied
4193	18	perceives	receives
4194	9	is	has
4195	10	competitive, economic	competitive economic
4195	24	servied	served
4197	2	sheet	shelf
4197	3, 5	sheaf	shelf
4198	6, 7	aberation	aberration
4198	8	aberations	aberrations
4198	25	when ASCAP	when an ASCAP

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PAGE	LINE	ERROR	CHANGE TO
4198a	2	ffrom	from
4196a	3	used?	use?
4199	2	ASCAP--BMI license	ASCAP and BMI licenses
4200	22	distr ibution	distribution
4201	5	andyou	and you
4201	6	hage	have
4201	24	it	I
4202	18	doesn't take	doesn't get taken
4203	3	with ASCAP	with an ASCAP
4203	15	is	is the
4206	23	quality	qualify
4206a	2	fromwhich	from which
4207	1	Nathan-direct	Marks-direct
4207	16	readint	reading
4208	1	Nathan-	Marks-
4208	6, 13	society	Society
4208	17	Appelbaum	Applebaum
4208	11	were	(delete)
4208	25	Idon't	I don't
4209	1	Nathan-	Marks-
4209	19	Does there	Does she there
4210	1	Nathan-	MARKS-
4210	3, 12, 14, 23	Appelbaum	Applebaum

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PAGE	LINE	ERROR	CHANGE TO
4211	1	Nathan-	Marks-
4211	3, 12, 13, 21	Appelbaum	Applebaum
4211	12	to -her	together
4211	21	either	--either
4211	21	forgoing	foregoing
4212	1	Nathan-	Marks-
4212	2	only, Inasmuch	only. ¶ Inasmuch
4212	18	Appelbaum	Applebaum
4212	25	lines	line
4215	24	how Mr.	how well Mr.
4216	16	inadmissable	admissible
4216	24	thenature	the nature
4217	10	themember	the member
4217	20, 23	society	Society
4217	23	tolicense	to license
4218	7	the licensing	for licensing
4218	8	price	rights
4219	2	youused	you used
4220	19	to a	in that
4220	19	under	understood
4224	6	is	are
4224	11	members	membership
4224	17, 19, 21, 23	Appelbaum	Applebaum

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PAGE	LINE	ERROR	CHANGE TO
4224	18	member	member,
4225	6	right	rights
4227	16	meaningfull	meaningful
4231	18	non ASCAP	non-ASCAP
4232	18	license	licensed
4232	20	ASCAP licensed	ASCAP-licensed
4233	2	inthis	in this
4235-41	1	direct	cross
4235	9	only	not
4236	19	Di	Did
4237	12	to 1969	to the 1969
4237	15, 16	society	Society
4237	24	ASCAP unlicensed	ASCAP-unlicensed
4238	5	alittle	a little
4238	10	ASCAP licensed	ASCAP-licensed
4239	19	lines.	license.
4240	8	alicense	a license
4240	20	licenses television	licenses to television
4241	7	time did	time, they did
4241	9	for	for a
4241	16	Ruben	Rubin

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